Panel Discusses Railroad Crossing Easements

Edited By H. Van Towle, SR/WA and Mary Turi

Editor's Note: A panel of four people from the Chapter 15 Liaison Committee prepared a panel discussion entitled "A Railroad Crossing Easement—How Much Is One Worth and How Is One Obtained?" Marty Tieger, SR/WA, H. Van Towle, SR/WA, Mary Turi and Ed Webster set up the program.

The panel discussed the relationship between utilities and railroads, and a mock condemnation proceeding was held to attempt to set value based on expert testimony. This article is a summary of the program that was presented to the general membership.

After hearing the review of the law, the positions of the two factions, the statement of facts and the two appraisals, those in attendance were asked to complete a questionnaire. They were cast in the role of 'jury' or condemnation commission and were asked to render judgment as to value of the proposed easement. They established the amount of award to be granted and you are asked to do the same by filling out the questionnaire at the end of this article.

You will be sitting on the jury and will decide if condemnation should proceed. If it does, you will be asked to state how much the easement should be worth. As you read the article, please keep in mind that the opinions rendered by the panelists may not necessarily represent their personal, professional judgment, but may be an opinion or point of view held by the entity that they represent in this role-playing situation.

The legal representative is Ed Webster, Jr.[1] Through the years, Ed has been appointed many times by the Superior Court of New Jersey to serve on condemnation commissions, and has heard numerous cases from that side of the fence.

"What I have to present is not an address on condemnation law and theory in a vacuum. I think such a presentation under these conditions would serve no useful purpose whatsoever. Instead, what I am going to try to do is to give a number of principles of condemnation law and procedure which may be helpful to members of the panel and the audience in considering the statement of facts provided to you. What I have to say is intended merely as a guide in that respect; it will not be detailed or exhaustive in the nature of a law review article, but short and general and, I hope, practical.

"Before discussing any of this condemnation law, however, I would like to remind you that in general there are three main stages of right-of-way acquisition. The first stage is the engineering stage, wherein the route is selected or other similar determinations are made. Most often that is left to the engineers and executives of the acquiring company. The attorney does not often enter this stage in any significant way, although frequently he will be kept informed as the steps are taken in the matter of route selection, because sometimes that becomes a major bone of contention in the litigation stage that may follow.

"Then, after the route is fixed, it becomes necessary to acquire the individual parcels needed to piece this route together. That part is normally handled by the land department or real estate department or the right-of-way department, depending on the nomenclature of the acquiring company. Sometimes the negotiators are permanent staff of that company. Sometimes, when a big program is in progress, it becomes necessary to engage one of the field service companies. Sometimes it becomes advisable for the condemning company to augment its own staff. But in the negotiating stage very often there is little law involved. The negotiators have their own methods and their own standards of activity, as well as their own pet theories. They work with these, we trust, on a professional basis in conducting their negotiations with parties from whom they expect to acquire the needed parcels. From time to time, however, the negotiators may find it helpful to confer with counsel regarding the legal points that arise.

"Now we come to the third stage, the one with which I am primarily concerned, and that is the condemnation itself, which commences after the negotiations have been conducted in good faith and have proved fruitless.

"In the right-of-way field it is not always necessary to condemn a fee simple absolute, that is, the entire right in the land. As a matter of fact, ordinarily the condemnor will be considered to have no power to take a fee simple absolute if some lesser interest, such as an easement or even a license, would satisfy its purposes. The condemnor should never undertake to acquire an interest greater than necessary because if that is attempted, the owner, through counsel, will usually resist, and probably succeed in so doing.

"Some examples of the interests that might be necessary in given cases are these. Suppose a State highway were under construction, and that it were necessary to take property for the construction of that highway. In almost all cases today, and this is specifically provided for in our New Jersey Constitution,[2] the condemnation would be for a fee simple absolute, because once the state takes over with a highway which it proposes to operate in perpetuity, what is left to the original owner of that land is not worth very much. It is not a substantial interest, and the state, therefore, does take the entire fee simple absolute.

"On the other hand, if only some drainage rights or slope rights adjoining the highway are required, very often the state will condemn merely an easement. In particular, in connection with slope rights, it is frequently provided that such rights will terminate if the owner so develops his property that the slope rights are no longer necessary for the maintenance of the highway in its intended location and condition.

"In the case of a pipeline company, with which operations I am familiar because of long experience, the usual condemnation for a pipeline right-of-way is the condemnation of an easement, whereas for compressor stations, metering stations and the like a fee simple absolute is acquired under the Natural Gas Act or other applicable legislation. But, in any event, when you look for the touchstone

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[1]Ed Webster, Jr., attended Rutgers College and graduated Phi Beta Kappa in 1939. He earned his Law Degree from the Cornell University Law School in 1942 and practices law in New Brunswick, New Jersey, as a partner in the firm of Watson and Webster. Ed is a charter member of IR/WA Chapter 15, a member of the Chapter 15 Liaison Committee, and he has been actively involved in the field of easements and condemnations since 1950.

[2]Const. of New Jersey 1947, Art. 4, sec. 6, par. 2.

as to how far the condemnor can go in taking these various interests, you have to begin with the controlling statute and the judicial precedents construing it, and this study will sometimes lead you into a consideration of constitutional problems as well.

"In a case such as the one before us, the preliminary question is whether or not the condemning utility, which here happens to be a communications utility with power of eminent domain, may condemn against another utility, which in this case happens to be a railroad which also has the power of condemnation. In the old days, the answer to this question used to be no, on the theory of the dog chasing its tail (i.e., if the communications utility were permitted to condemn against the railroad, the railroad would cordially reciprocate by condemning back against the communications utility that which had been taken from the railroad).

"However, in the landmark case of *Township of Weehawken v. Erie Railroad Company,*[3] decided by our New Jersey Supreme Court in 1956, there was a basic holding that the acquiring utility could indeed condemn, provided that its proposed public use would not destroy, or unreasonably interfere with, the existing public use of the utility being condemned against. That case has been followed ever since in New Jersey and elsewhere, too, because of the very persuasive reasoning on which it was based.

"For example, some of us are aware of a recent case in Ohio,[4] where the Ohio Bell was litigating with what was then the Penn Central Railroad for the acquisition of an easement very similar to the one that is discussed in your statement of facts. The court there held that, yes, this condemnation was valid and could proceed, and went on ultimately to make an award which was in a strikingly reasonable amount but also set up all sorts of terms and conditions which were binding upon both sides as to how these easement rights should be exercised. I do not think we have anything in New Jersey at the present time to permit a court to do that. However, in New Jersey, if a condemnor presents evidence at the condemnation hearing that it intends to use the easement or other property in a particular way, that is binding on the condemnor,[5] and the testimony could conceivably impose all kinds of terms and conditions, but it is not anything that a court would do in the first instance as was done in *Ohio Bell.*

"Now we come to the question of valuation, which I suppose is the real crux of the matter. Assuming that the rights which are desired by the taking utility can be acquired against the particular condemnee, how are those rights—usually an easement or a license—to be valued? This is not always an easy problem.

"If the highway comes through and takes an entire property in, let us say, a housing development, the problem of valuation is simple enough because comparable sales abound. The whole property is being taken, and all parties must be guided by the comparables. The trier of the facts readily fixes the price to be paid with the aid of the real estate experts who put the proper interpretation on the comparable sales. Usually both sides rely on the same sales and there is little room for dispute.

"But where you have a partial taking in the sense that you are not taking a fee, it is by no means that easy or that simple. One can undertake to use the 'before and after' market value approach, with which most of you are at least somewhat familiar, or, it is possible, under an equally sound legal approach, to value the part being taken or the interest being taken—an easement or a license or whatever it may be—and add to that the damages to the remaining interest or the remaining property, and thereby come up with a figure which is theoretically the same as you would get in using the 'before taking and after taking' approach.[6]

"But in using the before and after value approach, how would you determine the before value in the condemnation of a right to cross a railroad right-of-way? That is a pretty difficult matter. Does that automatically get you into an attempted valuation of the entire railroad, both before and after the condemnation takes place? That really does not make too much sense, and for practical purposes, it is impossible.

"On the other hand, suppose you did try to do it with a before and after approach. How would you find sales that are comparable? Sales of railroads or major parts of railroads, or even segments of railroads (except possibly surplus property) are very uncommon.

"If you try to provide just compensation by adding to the value of the taking an estimate of the damages to the remainder, it may not be too troublesome to fix the damages with the aid of engineers and real estate people, but the difficulty with the valuation of the part or interest taken will not go away because sales of comparable railroad property are usually nonexistent.

"Another problem that arises with the taking of partial interests is this—some railroads and other entities feel that the price that should be paid by the taker should somehow be measured by the benefit that the taker is to derive. In the case of a natural gas pipeline acquisition, the argument would run that you are putting so many million cubic feet of gas through that pipeline per year, and the railroad ought to be paid so much per cubic foot of gas transmitted. But there are New Jersey cases against that, and probably cases elsewhere, holding that ordinarily the price to be paid for an easement or license is to be measured by the extent of the property owner's loss, and not the taker's gain,[7] and this, of course, is consistent with the constitutional concept of just compensation, that the owner is entitled to be made whole and no more.

"Returning then to the use of comparable sales as evidence in these partial takings, we note that the sales of other easements or licenses are not ordinarily usable as comparables. That might seem a little surprising, but the theory of the courts has been that the sales price of an easement or a license usually includes not only the value of the interest acquired, but also a damage element, and the damage element is thought to be dissimilar in any two sales that you might try to compare.[8]

"There are cases, however, where the instrument whereby the easement or license is acquired breaks down the amount paid, or total consideration, as between value and damages. Then, if the easement acquired by that instrument is otherwise comparable to the one under

[3] 20 N.J. 572, 120 A. 2d 593 (1956).

[4] *Ohio Bell Telephone Company v. Penn Central Railroad Company,* unreported (Commons Pleas, Franklin County, Ohio 1978).

[5] *Packard v. Bergen Neck Ry. Co., 54 N.J.L. 553, 563, 25 A. 506, 509 (E. & A. 1892).*

[6] *State v. Interpace Corp.*, 130 N.J. Super. 322, 329, 327 A. 2d 225, 228 (App. Div. 1974).

[7] *State v. Cooper Alloy Corporation,* 136 N.J. Super. 560, 568, 347 A. 2d 365, 369 (App. Div. 1975).

[8] *Brown v. New Jersey Short Line R. R. Co.*, 76 N.J.L. 795, 799, 71 A. 271, 272 (E. & A. 1980); *Laing v. United New Jersey R. R. & C. Co.*, 54 N.J.L. 576, 579, 25 A. 409, 410 (E. & A. 1892).

consideration, I would say that certainly there could be some use of that conveyance as a comparable.

"But suppose there are no sales where the value and damages are clearly separated like that, which is the usual situation. What do you do then? Very possibly, you would try to ascertain the 'most feasible approach' to valuation permitted by the circumstances and the 'most feasible' method that would guarantee the condemnee just compensation.[9] The use of the most feasible method might include some utilization of rental figures. That is conceivable if there is access to any easement or license rental figures which could have any reasonable bearing on the situation. For example, if a railroad is being condemned against, it might be able to produce any number of rental transactions which could provide a yardstick for rental values which might in turn be capitalized to come up with a lump sum.[10] That is an extremely controversial point and one which is open to clarification as the courts proceed on a case by case basis.

"In any event, and to conclude, the courts seem to be growing more and more liberal as to the kinds of evidence they will admit to prove value. If the facts necessary to utilize the traditional methods of proving value are missing, other 'varied and flexible' approaches may be used which have a reasonable tendency to prove value and which assure just compensation.[11] Just because it is hard for an owner to prove the value of what is being taken from him or to prove his damages, that does not mean he is entitled to nothing, nor does it mean that he is entitled to some unrealistically large or speculative amount. So the advice I would give to you gratuitously here is that no matter which side you are on, if you have great difficulty in applying traditional methods of valuation of the taking and assessment of the damages, you should develop a theory of your case which is just as ingenious and as convincing as the facts will allow and perhaps your approach will receive the blessing of the court."

The utilities representative is Frank Dunst, SR/WA.[12]

"We will discuss, from the utilities standpoint, how we approach this type of situation, where there is a need to cross railroad right-of-way. I have been with TRANSCO for a number of years, and we have condemned private individuals, corporations, and even a municipality here in New Jersey, which was a rather historic case in its own right. However, we have never condemned a railroad, and I know of no company or utility in this state that has condemned a railroad. There must be a reason for this. I know that when we deal with a railroad, we are not happy with the type of agreement that they prepare. Generally, it is a revocable license agreement. They require an annual rental, load the terms and conditions in their favor, and include a relocation clause which enables them to cause you to relocate at your own expense within a certain number of days if they advise you to do so. This is a frightening thing to accept when you are putting a project together. But there is one point about the whole thing that I feel is good, the railroad will deal with you, and that is important. When you are in a project of some magnitude, you may have hundreds of properties and rights-of-way to acquire. Suddenly you are advised that the contractor will commence on such and such a day, and invariably the right-of-way acquisition has not been completed. There is usually some critical spot where we have got to do this, rush that, and force things to keep the project moving along. My experience has been that with the railroads, the problem is not that critical, because if you tell them you need something immediately, they will give you a right of entry upon their right-of-way and you can proceed with your job and work out the paperwork later. Granted you have to pay the cost of the railroad preparing the agreement instrument, but at the time it seems to me to be immaterial. You want to get started right away and the railroad will generally go along with this. When you have a contractor with a deadline to meet, this is important because there are thousands of dollars involved. If you are not happy with the railroad's proposed rental figure, you are going to go ahead and pay it anyway, as a practical matter. You have to, because there is no way to get around it.

"Condemnation is a very expensive and time-consuming operation, particularly here in New Jersey where the utilities do not have the benefit of the 'quick take.' I guess then that the reason there have not been any condemnations of the railroads in this state is that for any one crossing or occupancy, the money involved does not warrant it, and from the standpoint of time, you cannot afford it. In my own case, we will probably continue to deal with the railroads through negotiations rather than give serious consideration to condemnation. This may not make sense to a utility that has thousands of crossings, and applies for new ones regularly, but it does to a company that has only a few crossings, each of which is major in nature.

"It is conceivable that a utility might wish to challenge the entire principle by condemning for rights for a single, relatively inexpensive crossing, but they would have to be able to afford not to get on the property until after an award was made. And they would also have to do so fully aware of the fact that the cost of them obtaining such an award would far exceed the cost of them going along with the railroad in the first place."

The railroad representative is H. Van Towle, SR/WA[13]. The Chapter Liaison Committee made a sincere effort to obtain a representative from a railroad real estate department, but it was unsuccessful.

"A little railroad history—railroads in this country really came into their own in the period roughly between the Civil War

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[9]See *Beech Forrest Hills, Inc. v. Borough of Morris Plains,* 127 N.J. Super. 574, 584, 318A. 2d 435, 550 (App. Div. 1974).

[10]*North American Telegraph Co. v. Northern Pac. Ry. Co.,* 254 F. 417, 418–419 (C.C.A. 8th 1918).

[11]*County of Middlesex v. Clearwater Village,* 163 N.J. Super. 166, 173, 394 A. 2d 390, 393 (App. Div. 1978).

[12]Frank Dunst, SR/WA, is Division Land Representative for TRANSCO. His job involves matters of land and right-of-way acquisition in New York and New Jersey. He graduated from the University of Southern Illinois and began with TRANSCO in 1949. He then worked for Shell Oil Company and New Jersey Central Power and Light before returning to TRANSCO in 1957. He is a charter member of IR/WA Chapter 15 and has 30 years of right-of-way experience.

[13]H. Van Towle, SR/WA, Associate Staff Manager—Right-of-Way, New Jersey Bell Telephone Company, is representing the railroad point of view in the absence of a representative from the railroads. He is a graduate of Seton Hall University and is President of IR/WA Chapter 15. He has, in his work with New Jersey Bell, attempted to negotiate permanent rights from railroads and, as a member of the International Liaison Committee, has had the opportunity to familiarize himself with the railroad/utility relationship in many parts of the country.

and the turn of the century. The majority of railroad acquisition took place during that period, whether by grant, by purchase, or by condemnation or some other means. There were a variety of methods and after the acquisition was complete for any given line, there was an assembled right-of-way between two points, sometimes hundreds of miles apart, completely under the control of one entity.

"When we acquired this railroad right-of-way, we might have had to take 10 feet of someone's front yard, or a corner of a parking lot, or a portion of farmland. Each of them had to be looked at individually. Once they were all assembled, they acquired tremendously more value as a continuous parcel rather than a series of separate pieces. So we should look at railroad right-of-way as being far more valuable as a continuous strip connecting two points than it would be if we looked at equal but isolated acreage.

"At some point after the bulk of the right-of-way had been thus assembled, particularly in this part of the Country which is much more built up and densely populated than other parts, numerous types of utility companies sprang up. Most utility companies found it necessary to either follow or to cross railroad right-of-way to transmit and/or distribute energy to their customers.

"The railroads, not wishing to be obstructionists, or counterproductive, and wishing to have these various services available to the same general public that they themselves were attempting to serve, agreed to allow the utilities to use their lands for a modest fee. We have continued this practice to this very day—there are literally thousands of utility crossings and longitudinal occupancies of our right-of-way, with more and more cropping up daily.

"Our basic approach is this—if you want to place a facility which would serve the public good, you may do so, under my terms and conditions, which are not unreasonable. There are really only three conditions. First, you must place the facility in such a manner that it will not interfere with the use of the land as it was originally intended (at least as was intended at the time it was set aside for railroad purposes). That means that if you contemplate placing a facility under the tracks, it must be down at least five and one-half feet below the tracks. Although this requirement may result in a more costly construction job for you than you would normally encounter, the reasons for it are obvious. They arise from the safety standpoint, and are well accepted engineering standards . . . If you would contemplate an aerial crossing, no part of it may be less than 27 feet above the tracks. Again, this may result in the need for higher poles and more costly construction than the norm, but again the reasons are well founded.

"The second condition—you must agree to remove your facility upon receipt of ninety days written notice from us. We would not order such removal unless it comes to our attention that your facility prevents us from operating our railroad in a safe manner, or that it would interfere in any way with our own intended use, or proposed use, of our lands. Third, you will have to agree to pay us an annual fee for your use of the land. The amount is nominal in comparison to today's rentals, and is in accord with a fee schedule that was proposed and accepted by the Eastern Railroad Presidents Conference years ago, and agreed to by the utilities. It's as simple as that.

"A problem arises when the utility company representatives decide that they are not happy with the terms that we offer. Typically, they say they want some permanent right to occupy, in the form of an easement. We patiently explain that we do not grant permanent easements, because the presence of an easement would interrupt our continuous and sole control of the aforementioned assembled right-of-way strip. This by definition constitutes an irreparable damage.

"It strikes me personally that the utility really doesn't need an easement. We generally hear that the main objection is to the ninety-day revocable clause. There is not a utility in this State that can point to an example of the railroad invoking this clause. It seems that the utility companies have simply developed a superstition against the ninety-day aspect, as a knee-jerk reaction, in effect, and they seem to feel that it is 'the thing to do' to make noises about easements. There is another reason for our approach. We are under orders (from the Federal government, I believe), not to dispose of any more than a very small percentage of our assets in any given year. I may stand to be corrected on my arithmetic, but the principle is there, and if that is so, a wholesale granting of permanent easements would be contrary to our own instructions.

"Finally, there is the money angle. We take in something like $8 million annually from our utility crossing Agreements. This, to a railroad that is having a difficult time keeping from going completely under, is too much of a financial shot in the arm to release. I doubt if there is a utility company in this State, or anywhere else, that would do differently.

"If things are really urgent and there is a great deal of pressure to grant a permanent easement, the railroad will do so. The approach varies from railroad to railroad, but in this part of the country, we have basically accepted the following: Time permitting, we will look at the parcel in question, and establish our value. We will then look at the fee schedule, referred to earlier, to determine what the annual rental would be for the proposed utility facility under the normal ninety-day revocable arrangement. We then determine what 20 years rental would be—we assume that most utilities would plan their facilities to last for at least that length of time. In point of fact, the facilities will probably last a great deal longer than 20 years, so this is really a concession on our part—it is a bargain. In any event, the greater of the two figures—20 years rental or the appraised value of the easement—is the price the utility must pay.

"I am well aware of the fact that the utilities take a different approach. They would prefer to attempt to determine what value would be removed from the underlying fee, if the easement were granted, and use that as the value of the easement. Assuming that the utility's method of establishing the value of the fee is essentially the same as that used by the railroad, this method, basically the 'before and after' method, would be acceptable except for one thing. It assumes that we have a staff of trained appraisers sitting around waiting for the next application for a utility crossing to come in.

"This, is simply not so. The fact is that my own company receives about 175 such applications per month. Time, volume, and our own budget restrictions combine to form a constraint against this approach. We have to use an average figure for these matters, which was the purpose of the fee schedule in the first place. We cannot rely on the utility company appraisals, any more than you would rely on someone else's appraisal if they proposed to buy something from you.

"In summary, I cannot appraise ease-

ments—I do not have the time, the staff, the expertise or the budget to do so. I should not grant easements because of government restrictions. I would prefer to leave things as they are for financial reasons. I feel that we have been reasonable—that there is no need to go into condemnation. Finally, railroads have something of great value, and we intend to defend it, in its entirety, vigorously."

As in any case of this nature, the first and most important thing to be established is the fact pattern. Mary Turi, Right-of-Way Engineer for New Jersey Bell Telephone Company, outlined the proposal which is the subject of this exercise. She deals extensively with railroads in her job, analyzing valuation maps and construction prints, negotiating new utility agreements and updating existing ones. Mary has four years experience in this type of right-of-way work, and presents a case for the jury's consideration which she defines as a typical utility company proposal.

"The situation is real, and the following facts should be kept in mind to enable you to make a valid appraisal opinion. The company needs to construct an underground conduit system between points A and B, and is designing the job with sound engineering, as well as economics and practicality, in mind. Note on the sketch that the most direct route between A and B is across private railroad right-of-way, and the company's proposal is to purchase an easement from the railroad. The proposed method of construction is to build a sending pit on private property adjacent to the railroad (on an easement that has already been acquired), and a receiving pit within the public road right-of-way on the westerly side of the railroad right-of-way. After boring under the right-of-way, a steel casing will be placed between the two pits, and 12 ducts will be placed in it. Two communications cables will be placed in two of the ducts.

"The railroad has strict standards, or construction specifications, which must be adhered to, and the company thus agrees to push the casing under the right-of-way in such a manner that the top of the casing will be a minimum of five-and-a-half feet under the base of the rail, even though this depth adds greatly to the estimated cost of the construction project.

"On the subject of economics, the estimate of cost for the portion of the job involving the railroad is on the order of $30,000–35,000. The company could eliminate the need for a private railroad crossing, and the resulting proposal for a permanent easement, by designing the job so that it is totally within public road rights-of-way. However, to re-route the job in this fashion would result in an additional cost approaching $250,000 for additional conduit construction built to a point where the crossing could be made in the public street. The company approached the railroad with a request to purchase a permanent easement, and the request was denied.

"Therein lies the problem and the question—should the company accept the railroad's revocable license for the private crossing, redesign the job, or proceed with an action or condemnation and have a 'jury,' or commission, decide what is reasonable?"

The only missing ingredient now is the appraisal, or estimate of value. The first testimony on the subject is from Marty Tieger, SR/WA,[14] who was retained by the utility for this purpose. He prepared the following appraisal.

Description Of Property

The subject is a 100 foot wide railroad right-of-way, the center 20 feet of which is occupied by trackage.

The proposed subsurface easement will occupy the northerly 10 feet or a total of 1,000 square feet. It lies immediately east of Lot 19 in Block 273A.

Zoning

M2 (Heavy manufacturing)

Method Of Appraising

In estimating the value of an easement, it is necessary to first estimate the value of the fee. This is usually accomplished by examining and analyzing recent sales of similarly zoned properties and comparing them to the subject for such factors as location, time of sale, size and shape, topography, etc. Diligent research did not disclose any sales that were significant, but a consensus among knowledgeable industrial realtors indicates a fair market value of about $90,000 per acre for M-2 land if available.

A study of subsurface easement values indicates a range of 10–50 percent of fee value, depending upon the effect of the easement's presence upon the dominant fee. The use of the surface will not be impaired by the easement's presence. There is no apparent damage to the remainder of the dominant fee. The lower end of the range is indicated.

It is extremely unlikely that the present use will be changed to industrial acreage because of the elongated shape of the right-of-way and its lack of street access. These factors reduce its fair market value to 25 percent of the value of other M-2 land suitable for development.

Calculations Of Appraisal

$90,000 per acre = $2.06 per square foot.

.25 x $2.06—$.52 per square foot (fair market value).

$.52/s.f. x 10%—$.05/s.f.

1,000 s.f. x $.05 = $50 (value of easement).

A fair rental value is 15 percent of the easement value or $7.50 per annum.

Next we will hear from Harold J. Olsen,[15] who was retained by the railroad to establish a value of the proposed easement, and testify on their behalf. He prepared the following appraisal for the railroad, pointing out that it was done for the special purpose of the mock condemnation program.

"Bear in mind that this is a prepared presentation for the purpose of this Program, and was requested by the railroad. The Highest and Best Use of the property in question is railroad purposes, now and for the foreseeable future. Future anticipated use is railroad, and while they may someday go out of business and release the right-of-way, this cannot be assumed.

"When a railroad grants a crossing easement, it is not only the impact upon the fee which is considered. The railroad has learned over many years of experience with the thousands of easements that encumber their titles, that the problems that can arise are enormous and very costly. If the railroad must for some reason realign its track, the existence of the easement and the conduit it contains have to be considered in its construction and its costs. If the railroad needs to construct

[14]Marty Tieger, SR/WA, is a member and Past President of the Northern New Jersey Chapter of the American Society of Appraisers, member and Past President of the North Jersey Chapter of the National Association of Independent Fee Appraisers (NAIFA), member and Past President of IR/WA Chapter 15, and a member of the National Association of Real Estate Appraisers. He has taken courses from SREA, NAIFA, and IR/WA and he is a well qualified expert witness.

[15]Harold J. Olsen, SR/WA, SREA, has 46 years of appraisal experience. He has made appraisals for Federal and State agencies, county departments, municipalities, national corporations and utilities and he specializes in condemnation appraisals. He is Past President and charter member of IR/WA Chapter 15.

even a signal tower or some type of communication tower, the problem also arises. There are many such problems to be handled and the flow of utility service through the easement cannot be interrupted during this period. The railroad must retain the integrity of its right-of-way as much as possible and the fewer easements it grants, the better from the railroad point of view.

"I approached the problem of the easement value estimate the same way that Marty did. There are no sales of any property that have a reasonable degree of comparability. Through discussion with Real Estate Brokers and Appraisers in the general area as to the value of industrial property, I estimated the so-called market value of vacant land at $100,000 per acre. Because of the very important and valuable (or Highest and Best Use) of the subject land, it is my opinion that it should have an enhancement in value over the usual vacant land; therefore, I estimated its value at a 50 percent enhancement or $150,000 per acre.

"Because of the distinct possibility that at some future date the presence of the easement and the conduit contained therein may be the cause of additional construction problems with the consequent increased cost, I decided to give the easement area 50 percent of the per unit value. Also since the easement is in perpetuity, it presents another additional possible future problem for the railroad if and when this particular area is the site of a nearby improvement or replacement by the railroad.

The Value Estimate

$150,000 per acre = $3.44 per sq. ft.
Easement Area—10 ft. x 100 ft. = 1,000 sq. ft.
1,000 sq. ft. @ 50 percent value or $1.72 per sq. ft. = $1,720.

Rounded Figure

—$1,750 or the Estimated Value of the Easement.

Reasonable Annual Rental

15 percent of $1720, rounded off to $260 per year.

Summary

You have the statements of the entities involved, the facts surrounding the subject case, and the arguments and testimony regarding value appraisal. You are now asked to complete the questionnaire. For purposes of this exercise, you are asked to look at this matter not as a question of $50 vs. $1750, but rather as a principle of setting value and granting rights.

Questionnaire

1. In a situation such as this, what do you think is the appropriate course of action for the utility company?

_____ condemn the railroad for the 10 foot easement

_____ accept the license offered by the railroad, with terms as outlined

_____ redesign the job to avoid the need for an easement

_____ other (please describe)

2. Regardless of your judgment regarding Question # 1, assume that the utility chose to proceed with condemnation. How much do you think the utility should offer initially as consideration?

$_____

3. Assume that the offer was refused by the railroad, and the matter could not be negotiated. If you were appointed to the condemnation commission (a member of the 'jury'), how much would you award the railroad?

$_____

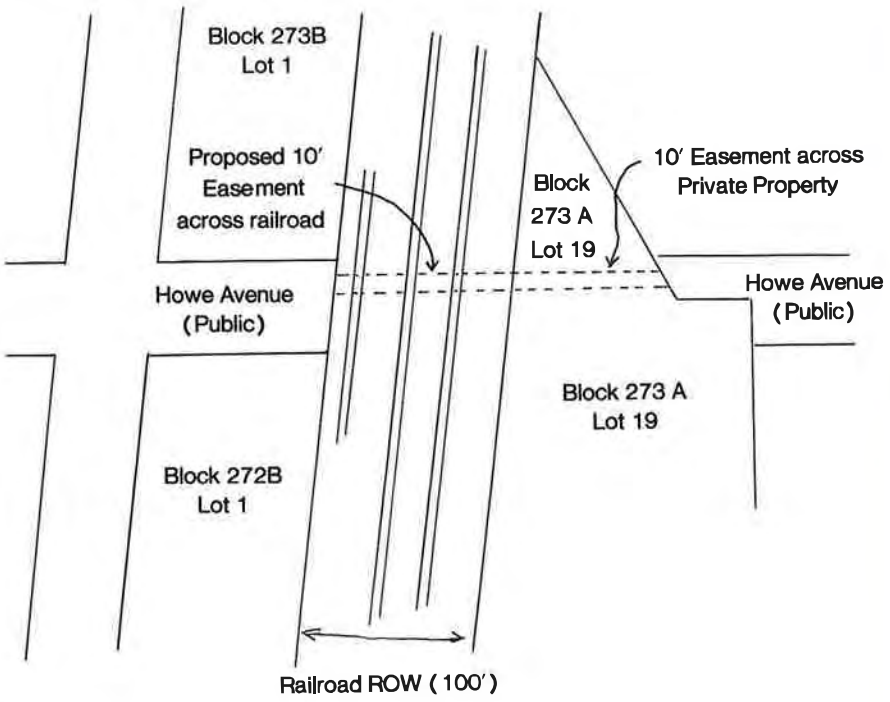
4. What, if any, damages (in addition to the value of the easement) do you feel are due to the railroad as a result of the utility company constructing their underground facility across the railroad right-of-way, and their continuing occupancy of same?

Please indicate whether you:

A. Are, or ever were, employed by, or in any way affiliated with, a utility company or any entity with the power of condemnation, that might find itself in a position similar to that described above? (Condemnor)

Yes _____ No _____

B. Are you, or were you ever, employed by, or in any way affiliated with, a railroad or any similar entity that might find itself in a position similar to that described above? (Condemnee)

Yes _____ No _____

Return the questionnaire to H. V. Towle, SR/WA, 27 Homestead Terrace, Scotch Plains, NJ 07076. During the program which was the subject of this article, there was a lively question and answer period. A transcript of this is available, covering such subjects as the railroad's fee schedule, what happens to existing licenses when the railroad property is abandoned or sold, could a condemnation such as this proceed under current utility commission regulations, etc. I think you will find it interesting, and I will send you a copy of the transcript if you request it when returning the questionnaire.