

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.

¹Ed 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.

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

"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