VantagePoint

By Wendy Lathrop, LS

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Rails Not Trails?

Rail banking has caused countless headaches for people that own property traversed by railroad rights-of-way. In our nation's history, the national attitude towards railroads has moved from resounding support (the land grant era) to adamant conviction of the "robber baron" status of railroad corporations. Those latter days led to the creation of the Interstate Commerce Commission in 1887 (replaced by the Surface Transportation Board, or STB, in 1995) to regulate rates, mergers, and abandonments with increasing stringency. Further burdened by taxation (1913 Valuation Act) and rising competition from automobiles, trucks, buses, and airplanes, the railroads were eventually reined in by the very bureaucracy that had once believed them to be of such great public importance that they had been granted the power of eminent domain.

In 1980 Congress acknowledged that a century of ever tightening parameters within which railroads could operate or cease to operate had created a lose-lose situation: the railroads were limited in what they could charge, so they could not afford upkeep on their tracks and other facilities (an extreme safety problem), yet they could not abandon unused or unprofitable lines to help keep costs under control. The Staggers Act gave railroads more control over their rates within certain limits and sped up the abandonment process.

Rail Banking

Eight years later came the amendments to the National Trails Act and the creation of rail banking. To preserve transportation corridors in our increasingly populated nation, the ideal of rail banking was to allow interim recreational use that would revert to rail use when required. This concept has raised many constitutional questions over the last decade, notably with the acknowledgment that hiking is not the same as railroading on properties that would otherwise revert, unencumbered by railroad easements, to owners of the underlying soil, and further that rail banking is an additional taking (*Glosemeyer v. US*, 45 Fed. Cl. 771, 2000) for which compensation is due (*Swisher v. US*, 178 F. Supp. 2d 1100, 2001).

> **"The written opinion outlines the hoops through which all interested parties must leap..."**

Usually we read of property owners wishing to regain their rights or to be compensated for a loss of their rights in perpetuity when rail banking is imposed; less common are cases regarding resurrection of rail use. *Borough of Columbia v. Surface Transportation Board* (342 F. 3d 222, 2003) is such an example, a battle over two and a half miles of rail line in southeastern Pennsylvania.

The Shawnee Run Greenway had acquired an option to purchase the rail line, which had been unused for more than ten years, from the line's owner. Shawnee's plan was to remove the rail and develop a trail along the route. But one of the adjoining property owners along the railroad corridor, Frank Sahd Salvage Center ("Sahd"), made an "Offer of Financial Assistance" (OFA) to the STB, while offering to buy the corridor from its owners, expressing intent to resurrect the line for shipping. The STB approved Sahd's offer to purchase the line, and Shawnee, along with the Borough of Columbia (through which the line ran), protested the STB's action.

Shawnee's main arguments were (1) that there was little likelihood that Sahd would actually restore the rail line to active use (meaning that this was merely an attempt to gain fee to the land), and (2) that the transfer of the rail line to Sahd was an unconstitutional taking. What is most intriguing in this suit is that these two arguments are usually heard from the owners of the underlying soil of the right-of-way, not from the would-be rail bankers. The written opinion outlines the hoops through which all interested parties must leap in order to preserve the rail corridor either for active transportational use or for recreational purposes.

The Court traces the ownership of this particular rail corridor from its inception in 1864 until its last carriage of freight in 1990. Physically, this section has been removed from any practical service through the elimination of road crossings and connecting switches. In the early 1990s, Sahd had apparently expressed interest in purchasing the line but the deal fell through, and by 1999 a local businessman purchased an option to acquire the line, then transferred his option to the Shawnee Run Greenway.

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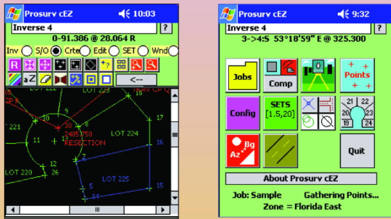

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In preparing to establish the greenway, Shawnee made payments toward the purchase price and commissioned boundary surveys and environmental analyses. In 2001, a Master Plan for the greenway resulted from a collaboration of the Pennsylvania Department of Conservation and Natural Resources, the Borough of Columbia, the adjoining Township of West Hempfield, and Columbia's Downtown Development Corporation. In the planning process, the preference of just one adjoiner, presumably Sahd, was noted as being for a rail with trail, as opposed to just a trail established after removal of the tracks. But the study concluded that “a rail with trail alternative in all likelihood would be economically and institutionally infeasible,” and the owners filed the appropriate and required “Statement of Willingness To Assume Financial Responsibility” with STB.

Three days later, and within the regulatory time frame allowed, Sahd filed its notice of intent to file its OFA to preserve the rail line, and eventually the STB decided in favor of this firm. The suit challenges the basis of that decision, saying that the STB is obliged to evaluate the likelihood of continued rail service in light of the fact that Sahd's salvage firm had no experience in operating a rail line and had “refused to disclose any plans or data showing how it would use the line for rail purposes, or whether it will use the line for rail purposes at all...” (a view supported by the lone dissenting judge). The Court noted that the STB only “requires a sufficient showing to support a finding that an offer is, indeed, for continued freight service and not for some other purpose.” Were the Court in the STB's place, it might not have come to the same conclusion, but it is limited to determining if the STB had evidence to support its decision, which was reasonably consistent with the STB's own precedent.

Shawnee's second claim, that the STB violated the Fifth Amendment prohibition against taking property without compensation, was based upon its belief that the proposed rail use will be for private profit rather than the general public good, and cites the loss of its financial investment in pursuing greenway status for the corridor as the “taking”. The Court found nothing contradictory to regulatory process and reasoning, and upheld the STB's action.