



Real Estate Committee Feature:

Utility Crossings of Railroad Right of Way

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For railroads, the issue of utilities, pipeline operators, wire companies, gas companies, etc., trying to expedite crossings of railroad property is a topic of frequent concern. Railroads sometimes find themselves in the situation of trying to preserve the safety and integrity of their rail lines and operations in the face of determined attempts to expedite crossings of railroad property without agreement or adequate notice.

Railroads frequently find themselves under the jurisdiction of state law on these issues as the preemptive effect of federal law under the Interstate Commerce Commission Termination Act, or ICCTA, has not always held sway in these situations. Similarly, the Surface Transportation Board ("STB") has not always been helpful to railroads with regards to federal preemption on these issues. In a case involving condemnation of the property of Eastern Alabama Railway LLC by a water and sewer utility, the STB held that matters in dispute regarding this proposed crossing of the rail line by the utilities was a matter of state law and not federally preempted. See *Eastern Alabama Railway LLC – Petition for Declaratory Order*, STB Docket Number FD 35583, decision served March 9, 2012.



Despite being under the jurisdiction of state law in dealing with these issues and not always being able to rely on federal preemption, railroads do have an array of powerful arguments at their disposal. For one thing, railroads are private entities and, therefore, should be able to assert the rights of private property owners in eminent domain cases. Therefore, railroads are well advised to make every effort to determine the exact status of ownership when encountering these crossing situations. For example, even in a public roadway location that is being used for the crossing, there could be an issue as to what rights the underlying landowner can assert if the public roadway is only crossing under easement rights.

In addition, railroads must be sure to know which particular state law is applicable in a given circumstance. Certain states, such as Wisconsin and Minnesota for example, have very discrete and unique laws directed at utility crossings on railroad properties. Texas, for instance, has laws dealing with public utilities crossing railroad rights of way, but separate laws dealing with pipeline companies crossing railroad rights of way, which give the pipeline companies greater rights than other utilities. Nonetheless, in Texas, case law makes it clear that even if one public entity has already been given a license or an agreement to cross property at a public right of way, it does not necessarily open that crossing to any and all public utilities. Rather, for each and every crossing, there must be a separate condemnation proceeding, even if it's likely that there will be no compensation awarded. These examples are only illustrative; one has to look at the individual laws of each state.

The latest frontier on which these crossing issues come into play is in the development and installation of fiber optic cables. Some fiber optic developers have tried to assert that there is a general right to cross railroads at public roadways without paying any compensation and without giving adequate notice, and in support they have asserted various theories of public ownership over railroad property. However, in our opinion, these theories are misguided and should not be accepted. There are many myths and misperceptions regarding public ownership of property – to truly understand the ownership situation of any given piece of land, one really must go into the real estate records. In addition, even when state laws otherwise permit a crossing, they may still provide a railroad avenues to assert legitimate safety concerns that could be created by the attempted crossing. Minnesota, for example, has a provision, Section 237.04 of the Minnesota Statutes, that allows utilities in general to cross railroad property upon notice in the absence of an agreement, but does provide that if there is a legitimate safety concern and it is asserted in writing, then the utility must wait for specific regulatory authority.

An interesting dispute underway right now in Texas involves Union Pacific actions against Fiberlight LLC, pending in a number of district courts there. Union Pacific has been able to obtain temporary injunctions preventing Fiberlight from crossing its tracks with fiber optic cable in Brazos, Robertson and Bexar Counties. In the Brazos County matter, Union Pacific has been able to secure a temporary injunction from State District Judge Travis Bryan III preventing Fiberlight from crossing their property as part of a large project of installing thousands of miles of fiber optic cable throughout Texas. Even though Fiberlight had a Certificate of Authority from the Public Utility Commission which allowed it to install facilities in public rights of way, Union Pacific successfully asserted that Fiberlight was trespassing on railroad property by performing work without permission, specifically by boring a hole under Union Pacific tracks along 26th Street in downtown Bryan and installing a fiber optic telephone line without the railroad's consent. According to the information in the case, the crossings at issue are all within public right of ways going across railroad tracks. In spite of the situation of the proposed fiber optic crossings being within public rights of way when they cross the railroad tracks, the judge in the Brazos County litigation has issued a temporary injunction preventing Fiberlight from crossing at Union Pacific tracks without an agreement. The Judge ruled the railroad "cannot be deprived" of its "constitutionally protected property rights without just compensation" and that Union Pacific "has demonstrated a probable right to recovery and a probable injury."

If the temporary injunctions in any of these actions become permanent, this could have a big impact on railroads in Texas, an especially important state given its size, growth rate, and significant amount of railroad mileage. It also could have repercussions nationwide as other fiber optic companies have sometimes been locating their lines within public right of ways while not always providing notice to the railroad or paying appropriate access fees. One has to look at individual state laws, but nonetheless it will be interesting to see if this approach is successful in Texas and then to explore whether enough similarities can be found with other state laws such that this legal holding is applicable in other states.

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