



*Real Estate Section Feature*

## **Recent developments regarding utility crossings of railroad right of way**

**Madeline E. Roebke-Curns**

Senior General Attorney, Union Pacific Railroad

Anyone working in the area of railroad real estate is familiar with the conflicts that arise when utility companies seek access to railroad rights of way. It would be best for railroad business if railroads could completely avoid sharing their corridors with utilities. Yet, given the reality that railroads stretch north to south, east to west and every direction in between with miles of contiguous corridor, it is necessary for railroads to permit crossings for lines to bring power, gas, high speed internet and other utility necessities to the public. Recognizing this fact, the typical clash between the industries is not about whether utilities may locate in the railroad corridor but rather terms and conditions upon which the right to intersect will be granted.

The primary complaint by utility companies is that obtaining railroad agreements is time consuming and expensive. Utility companies (and their contractors) question the cost of real estate fees, insurance and flagging. Contractors, in particular, have tight time schedules to meet and are frustrated when their time schedules are affected. On the other hand, railroads are highly sensitive to ensuring compliance with their procedures to protect railroad safety and operations.

In the past few years, the railroad industry has witness numerous attempts by utility industry advocates to statutorily govern the utility crossing process. Iowa and Wisconsin have such laws in place. In 2016, utility industry advocates in Minnesota sought to implement such legislation. While the Minnesota Revised Statute Section 237.045 was ultimately passed, thanks to the hard work of the railroad industry and its advocate Ann Kennedy of Ann E. Kennedy Law PLLC, the legislation included a number of revisions to protect railroad safety and operations.

First, and most importantly, the statute has several provisions to protect railroad safety. Utilities must submit their engineering designs to railroads for review. In addition to the plans for the crossing, the submittal must show the crossing in relation to the railroad's property and infrastructure. Railroads have the ability to request an inductive interference study at the utility's expense if there is a potential for interference and utilities must modify their plans to mitigate any interference. Railroads have the ability to petition the Public Utilities Commission in the event the railroad believes the crossing poses a "serious threat to the safe operations of the railroad." Utilities are required to procure insurance, including railroad protective liability insurance, and are required to reimburse railroads for "reasonable and necessary" flagging expenses.

In addition to the safety provisions, the statute has a couple of other provisions that are useful to protecting railroad operations. The statute applies only to crossings and does not permit longitudinal occupancies (sometime called parallel encroachments). As railroad real estate professionals know all too well, avoiding parallel utility encroachments is important to protect the ability of railroads to add railroad capacity without having to manage utility line relocations in addition to the rail project. In the event a

utility relocation is necessary to accommodate railroad operations, the statute provides that the utility will relocate in a reasonable period of time at the utility's own expense.

Of course, there are also provisions in the statute that are less favorable to railroads. Now that there is a statute mandating crossings, railroads lose all leverage to require other terms and conditions and set real estate fees for crossings. The statute establishes a standard fee of \$1,250 per crossing, which will be adjusted annually in accordance with a producer price index. No fees will be assessed for crossings in public rights of way. In addition, utilities will have an automatic right to begin construction 35 days following receipt by the railroad of the completed application, fee and certificate of insurance unless the railroad notifies the utility in writing that the proposed crossing is a serious threat to the safe operations of the railroad. In the event the railroad objects to the crossing or seeks to impose additional requirements, the railroad must petition the Minnesota Public Utilities Commission within 60 days from the date of its objection.

The Minnesota statute, like other state statutes of this nature, does not prohibit utilities from reaching a private agreement with the railroad in lieu of exercising its statutory rights. Whether in a state with no statute and lots leverage on the railroad side or in a state with a statutory process and less leverage on the railroad side, it is my opinion that it is preferable for all involved to come to a detailed understanding in a private agreement for the terms and conditions of the crossing. In order to achieve agreements in states with statutory processes and to improve relationships with utility companies and avoid legislation in other states, we are working to recognize and address the needs of the utility company. Our strategy in a nutshell is quite simple—we are bullish on the issues of safety and operations, we compromise on matters that are less mission critical and we strive to do our best to make the process as efficient and pain free as possible for utilities.

In that spirit, Union Pacific has developed an online application system designed to expedite the engineering review and agreement preparation process. We generally issue agreements within 30 to 45 days and will guarantee a faster process in exchange for a fee. We are exploring the opportunity to utilize private flaggers (as opposed to railroad employee flaggers) for utility projects that have no benefit to the railroad as another way to meet the needs of utilities for a quick installation. (Please note that the ability to utilize private flaggers will depend on site specific agreements with railroad unions.) Union Pacific does not charge fees for crossings located in public streets.

In addition to enhanced customer service, our team has found it helpful to level set our discussions with utilities by explaining our concerns and perspective. We explain that our focus and priority is protecting railroad safety and operations. Generally speaking, most people are familiar with the safety risks associated with the installation, such as cutting a third party or railroad owned utility, fouling the tracks with equipment or compromising the integrity of the tracks. The people we deal with are generally less familiar with the future impact utility installations can have on rail operations and growth. We find it useful to explain how power lines can interfere with signals and how some utilities must be relocated before extra track infrastructure can be added. It is often possible to provide utilities options; for example, an installation with a standard relocation provision may be converted to a permanent right if the installation is modified to a depth or height that will not interfere with any future railroad capacity changes.

Please contact Madeline E. Roebke-Curns at (402) 544-1121 if you have any questions.