



FINAL REPORT

APPENDIX 5C

RAILROAD RIGHTS OF WAY AND THE KANKAKEE-UNIVERSITY PARK COMMUTER RAIL PROPOSAL

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The purpose of this memorandum is to provide information on the history of railroad land grants and, in particular, the nature of Illinois Central Railroad Company's title to the land granted to it between University Park and Kankakee, Illinois, in connection with the proposal to provide commuter rail passenger service between those points.¹

The memorandum was compiled from publicly available sources. Access to records maintained by IC was neither requested nor provided, and IC management has neither reviewed nor commented on the memorandum. Land title records were not searched.

The interest railroads have in public lands granted by the federal government depends on the exact wording of the grant, federal law and the law of the state in which the property is situated.

The history of the Illinois Central land grant was summarized in *Illinois Central R. Co. v. Illinois*, 163 U.S. 142 (1896):

"By the act of congress of September 20, 1850 (chapter 61), entitled 'An act granting the right of way and making a grant of land to the states of Illinois, Mississippi and Alabama, in aid of the construction of a railroad from Chicago to Mobile,' the right of way through the public lands, with the right to take earth, stones and timber necessary for the construction of the road, was 'granted to the state of Illinois for the construction of a railroad from the southern terminus of the Illinois & Michigan Canal to a point at or near the junction of the Ohio and Mississippi rivers, with a branch of the same to Chicago on Lake Michigan, and another via the town of Galena in said state to Dubuque in the state of Iowa,' and a copy of the survey of the road and branches, made under direction of the legislature, was required to be forwarded to the proper land office, and to the general land office in the city of Washington. By sections 2-4, alternate

¹ While the railroad refers to itself publicly as "Canadian National" after its parent, Canadian National Railway, its corporate name remains Illinois Central Railroad Company.



FINAL REPORT

sections of land on each side of the road were granted to the state of Illinois, 'subject to the disposal of the legislature thereof, for the purposes aforesaid, and no other; and the said railroad and branches shall be and remain a public highway, for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States.' By section 6, 'the United States mail shall at all times be transported on the said railroad, under the direction of the post-office department, at such price as the congress may by law direct.' And by section 7, 'in order to aid in the continuation of said Central Railroad from the mouth of the Ohio river to the city of Mobile,' similar grants of 'rights, privileges and liabilities,' and of lands, were made 'to the states of Alabama and Mississippi, respectively, for the purpose of aiding in the construction of a railroad from said city of Mobile to a point near the mouth of the Ohio river.' 9 Stat. 466.

"The legislature of Illinois, by the statute of February 10, 1851, incorporated the Illinois Central Railroad Company, and empowered it 'to survey, locate, construct, complete, alter, maintain and operate a railroad, with one or more tracks, from the southern terminus of the Illinois & Michigan Canal to a point at the city of Cairo, with a branch of the same to the city of Chicago on Lake Michigan, and also a branch via the city of Galena to a point on the Mississippi river opposite the town of Dubuque in the state of Iowa'; and, by section 15, for that purpose only, ceded and granted to that corporation the right of way and lands granted to the state by the act of congress of September 20, 1850; and required 'the main trunk thereof, or central line, to run from the city of Cairo to the southern termination of the Illinois & Michigan Canal,' 'and nowhere departing more than seventeen miles from a straight line between' those two points; and required the corporation to mortgage said right of way and lands to the state of Illinois to secure the application of the proceeds of those lands 'to the constructing, completing, equipping and furnishing said road and branches, in accordance with the terms of this act, and said act of congress'; and, by section 19, declared 'said road and branches to be free for the use of the United States, and to be employed by the post-office department, as provided in said act of congress.' Priv. Laws Ill. 1851, pp. 61, 66, 68, 71. And by section 3 of the statute of Illinois of February 17, 1851, that act of congress was expressly 'accepted, and the conditions expressed in said act are hereby agreed to, and made obligatory upon the state of Illinois.' Gen. Laws Ill. 1851, p. 192."

Thus, Congress granted the state of Illinois a right of way for a railroad and "alternate sections of land on each side of the road," and the state in turn "ceded and granted" the right of way and lands to IC.



It is significant that the state's grant to IC was phrased as follows: "The said corporation shall have right of way upon, and may appropriate to its sole use and control, for the purposes contemplated herein, land not exceeding two hundred feet in width through its entire length." Railroad rights of way are considered easements, not fee simple interests conveying ownership of the land (*Great Northern Ry. Co. v. U.S.*, 315 U.S. 262 (1942)). An easement is extinguished when the use to which the easement holder put the property (in this case, railroad operations) ceases.

However, the state's intent is clouded by the inclusion of the following language in the 1851 statute: "The said Governor of the State of Illinois shall, in his official capacity, and in behalf of the State of Illinois, and under the great seal thereof, execute and deliver to said company a deed, in fee simple, of all said lands, etc., said right of way . . ." Governor Augustus French subsequently signed a deed conveying the right of way and alternating land sections to IC in fee simple.

The courts have exhibited some confusion over whether IC's interest in its "charter lines" 200-foot right of way is a right of way (i.e., an easement) or a fee. In *Louisville & Nashville R. Co. v. Illinois Central R. Co.*, 174 Ill. 448 (1898), the Illinois Supreme Court described IC's interest in its 200-foot right of way at Ashley as a fee simple, not an easement. A similar conclusion was reached in *Illinois Central R. Co. v. Chicago, Burlington & Northern R. Co.*, 26 F. 477 (C.C.N.D.Ill. 1886)(IC's interest in its right of way at Portage was a fee sufficient for CB&N to condemn a right of way across it). Subsequent decisions held that the interest conveyed in IC's right of way is a "limited fee subject to an implied condition of reverter [to the federal government] in the event it ceases to use or retain the right of way for the purpose for which it was granted" (*United States v. Illinois Central R. Co.*, 89 F. Supp. 17 (E.D.Ill. 1949), aff'd 187 F.2d 374 (7th Cir. 1951) [IC has the right to recover oil and gas beneath the 200-foot right of way]).

43 U.S.C. 912 reads as follows:

"Whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment be transferred to and vested in any



FINAL REPORT

person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures of any kind as aforesaid, except lands within a municipality the title to which, upon forfeiture or abandonment, as herein provided, shall vest in such municipality, and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever: Provided, That this Act [this section] shall not affect conveyances made by any railroad company of portions of its right of way if such conveyance be among those which have been or may hereafter [after Mar. 8, 1922] and before such forfeiture or abandonment be validated and confirmed by any Act of Congress; nor shall this Act [this section] affect any public highway now on said right of way [on Mar. 8, 1922]: Provided further, That the transfer of such lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land so transferred and conveyed, with the right to prospect for, mine, and remove same.”

In other words, if a railroad relinquishes its right of way easement over former federal lands by abandoning railroad operations, it loses its interest in that property. The federal government's property interest in the right of way goes to the surrounding municipality, if the property is within a municipality, or to any party “to which title of the United States may have been or may be granted.” Some courts have read into this language the concept that the federal government retains a reversionary interest in property encumbered by such easements (e.g., *Whipps Land & Cattle Co. v. Level 3 Communications, LLC.*, 265 Neb. 472, 658 N.W.2d 258 (2003)); others have found no such interest (*Beres v. U.S.*, 03-785L (Ct.Fed.Claims 2005)(not published).)

IC's quitclaim conveyances of charter right of way following abandonment of the Freeport-Branch Junction trackage in the 1980s generated a series of lawsuits contesting the interest conveyed. In *City of Maroa v. Illinois Central R. Co.*, 229 Ill.App.3d 503 (4th Dist. 1992), the Appellate Court found that Maroa (a municipality) had established ownership of the charter right of way within its borders by demonstrating that “there was a Federal grant of public lands for the purpose of creating a railroad and that the portion of the right-of-way through Maroa has been abandoned,” thereby satisfying the requirements of 43 U.S.C. 912. Subsequent decisions by the same court affirmed that conclusion.

The factual background of the proposed commuter rail project, though, is different. IC for many years operated a multiple-track main line between University Park and Kankakee. That main line (south of



FINAL REPORT

Stuenkel Road) was reduced to single track with passing sidings in the early 1990s. Presumably, however, IC did not relinquish its 200-foot right of way, and obviously it continues to use the right of way for railroad purposes.

If a government entity involving Kankakee County were to purchase or lease a portion of the 200-foot right of way for the purpose of constructing one or more tracks paralleling the existing main track, it is unlikely, in my opinion, that the transaction would be construed as a partial abandonment of the land grant triggering reversion to the federal government, in turn enabling the federal government to grant the property back to the government entity. The courts that have considered the question ruled that land grants cannot be partially abandoned by nonuse, making the unused segments subject to adverse possession (*Barnes v. Southern Pacific Co.*, 16 F.2d 100 (9th Cir. 1926); *Richardson Real Estate Mining & Commercial Corp. v. Southern Pacific Co.*, 32 Ariz. 491 (1927); *Allard Cattle Co. v. Colorado & S. R. Co.*, 187 Colo. 1 (1974)). Moreover, the transferred property still would be devoted to railroad use, meeting the requirement of the grant. Indeed, the proposed construction could be interpreted as merely restoring trackage that previously existed.

Even if IC were to completely abandon railroad operations between University Park and Kankakee (obviously an extremely unlikely scenario), the purchase and use of the right of way and existing trackage by the government entity would not, in my opinion, be different enough from IC's operations (which still include passenger service operated by Amtrak) to result in any reversion of the land grant to the federal government.