

OFFICIAL OPINION NO. 71-39, Title to abandoned right-of-way over school lands granted to the railroads under Act of Congress, March 3, 1875 (The General Railroad Right-of-Way Act); and the effect of the abandonment by the railroad of the use and rendition

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

September 24, 1971

Ralph Ginn, Commissioner
School and Public Lands
State Capitol
Pierre, South Dakota 57501

OFFICIAL OPINION NO. 71-39

Title to abandoned right-of-way over school lands granted to the railroads under Act of Congress, March 3, 1875 (The General Railroad Right-of-Way Act); and the effect of the abandonment by the railroad of the use and rendition of service over the land granted to it.

Dear Mr. Ginn:

You have requested my opinion in regard to who owns the title to school lands, over which a right-of-way was claimed by a railroad corporation pursuant to a Congressional Act of 1875 and since abandoned.

The factual situation relative to such property and the claim of the railroad is as follows:

On May 28, 1969, the Chicago & North Western Railway Company, pursuant to Section 1 (18-20) of the Interstate Commerce Act filed its application with the Interstate Commerce Commission requesting its authority to abandon the segment of rail line between Gettysburg and Redfield, South Dakota, a distance of approximately 75 miles. The application was on the 25th day of August, 1970, which was granted, and the dismantling of the track and the elimination of rail service are now accomplished facts. Stations intermediate from Redfield to Gettysburg (Rockham, Birchmere, Faulkton, Lemmon, Miranda, Seneca and Zell) have been abandoned as to both interstate and intrastate traffic.

That fact is noted in Supplement 1 to Official Lists of Open and Operating Stations No. 85, on November 5, 1970, in the Rail Tariff.

In F. Docket No. 24710 on March 6, 1970, relating to this abandonment, the history of the original railroad which built the line (Redfield to Gettysburg) is disclosed as follows in the ICC report:

The segment of the line proposed for abandonment was constructed in 1886 and 1887 by Dakota Central Railway Company and was leased to the applicant. On June 7, 1900, the property of Dakota Central, after an intermediate transfer, was purchased by Chicago and North Western.

Details of these transactions are not readily available in that it occurred prior to enactment by Congress of the Commission's jurisdiction over purchase or lease by one carrier or another. (Sec. 5 of the Interstate Commerce Act.)

The Dakota Central Railway Company on the 15th day of May, 1879, filed its articles of incorporation with the Secretary of Dakota Territory reciting therein that it would build a railroad from the eastern boundary of Territory of South Dakota extending from Brookings County westward to the Missouri River in Hughes County (Vol. 2, page 9) and on November 21, 1883 filed with the Secretary a Resolution that it would build the railroad from Redfield extending westward to Sully County. (Vol. 7, 317 Official Records). This latter line is the subject of this case.

This railroad right-of-way is located on several sections of school land granted to the State of South Dakota in Sec. 10, of the Enabling Act of 1889, which excluded any part thereof which had been sold or otherwise disposed of by Acts of Congress. The Act of 1875 was at the time in effect, and the material parts read:

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, that the right of way through the public lands of the United States **is hereby granted** to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber

necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

Sec. 4 That any railroad company desiring to secure the benefits of this act, shall within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass **shall be disposed of, subject to such right of way**; Provided, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

It appears that the procedural requirements of the Act of 1875 have been complied with by filing a copy of the Articles of Incorporation, due proof of its organization as a railroad, and claiming the benefit of the Act of 1875 and by filing with the register of the land office of the district a profile of its road, all done by the railroad which by successive grants became and now is the Chicago and North Western Railway Company. Whether this grant by the government of this right-of-way constitutes an easement or a conditional fee title is not the controlling question (*MacDonald v. U.S.*, 119 F 2d 821). Upon abandonment thereof, the fee title of the right-of-way reverted to the United States and the railroad rights were lost as contemplated by the Act of March 8, 1922, Sec. 912, Title 43 USCA.

There are a large number of cases which have been decided by the courts, both state and federal, determining the rights of entrymen (homestead) the rights to the minerals and oil and gas in the subsurface of the land, embraced in railroad rights-of-way over the public lands. These cases, while informative, do not constitute final adjudication of the title and status of a railroad right-of-way obtained pursuant to the Act of March 3, 1875, when service over the land has been permanently abandoned as here obtains.

The subject rail line was constructed and in operation since 1887, the Enabling Act was approved in 1889, and the right-of-way granted by the Act of March 3, 1875 to it confirmed by 49-20-19 SDCL and Session Laws 1890, Ch. 61.

An important decision (March 26, 1900) by the United States Supreme Court in Jamestown & Northern Railway Co. v. Jones, 177 U.S. 125, construing the Enabling Act (of S. Dakota and N. Dakota) and the Act of March 3, 1875 which clearly answers the subject here involved where the railroad has been built and is in operation as follows:

Under the Act of March 3, 1875, granting to the railroads the right-of-way through the public lands of the United States such grant to the railroad took effect upon the construction of its road.

In this case no occupant or possessory claims are involved as to any part of the railroad right-of-way here in issue.

The State of South Dakota under the Enabling Act of February 22, 1889, obtained the title to Sections 16 and 36 in each township of the public lands to the extent and in the manner prescribed in the Act of March 3, 1875. In tile March 3, 1875 Act it is provided that:

The Legislature may provide for the manner in which private lands and possessory claims on the public lands may be condemned.

In compliance with that provision, the South Dakota Legislature at the first session after Statehood in 1890, enacted a companion statute to the Act of March 3, 1875, by making reference there in Sec. 4, and giving full effect to the provisions of the federal Act and adding a few details which statute is now published as 49-20-4 to 49-20-14, SDCL 1967. The object of this state statute was to provide for obtaining rights-of-way for railroads in crossing school sections not already built by railroads, and confirming titles where already constructed. As required in Section 49-29-14, plats of the already constructed rail lines in 1887 were duly filed on May 12, 1890 by the predecessor of the Chicago & North Western Railway Co. under the following certification.

This certifies that the Dakota Central Railway Company has heretofore constructed its line of railway across Section 16 in Township 118 North, Range 75 West of the Fifth Principal Meridian; that the above plat correctly shows the location of such railway across said land, the boundary lines of its right-of-way, and the number of acres thereof in each Government Subdivision; and that it has acquired such right-of-way under and by virtue of the Act of Congress granting a right-of-way to railroads through the public lands of the United States, approved March 3, 1875. Dated May 12, 1890. DAKOTA CENTRAL RAILWAY COMPANY. By /s/ Chief Engineer.

Section 14 of the State statute reads as follows:

The commissioner of school and public lands shall require all railroad companies that have heretofore constructed lines of railway over any land which have **since been granted** to the Territory of Dakota, or the State of South Dakota, to immediately file in his office maps of such railway showing the route thereof across such lands and clearly indicating the boundary lines of the right-of-way and station grounds of such railroad company, situated upon such lands, and which rights-of-way and station grounds have been acquired by such company under Acts of Congress. Upon the filing of such map the commissioner of school and public lands shall note the same upon the maps in his office upon each legal subdivision of school or other public lands crossed by such railway, and when any such lands shall be thereafter disposed of, such right-of-way and station grounds shall be expressly reserved for the use of such railroad company by appropriate description.

We, therefore, turn to the Act of Congress of March 8, 1922 relating to the disposition of abandoned right-of-way (Sec. 912, Title 43, USCA). The pertinent parts of this Act 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 bested in any 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; ...

In view of the factual situation presented, and the applicable Acts of Congress, and the laws of South Dakota, my opinion in regard to the present status of the title to such railroad right-of-way that once existed across school lands of South Dakota, but which since its occupancy has been abandoned by the affirmative Act of the Railroad Corporation, is as follows:

With the support of the decisions of substantially all federal and state courts that the right-of-way easement of the Chicago & North Western Railway Company upon abandonment reverted to the United States, and under the above quoted statute (Sec. 912, Title 43 USCA) it is my opinion that the rights of the government then and there by statute were transferred and granted to and vested in the State of South Dakota, the party to whom the land had been granted under the Enabling Act.

The Chicago and North Western Railroad has suggested a payment to it of \$1,000.00 for a quit claim deed for the subject land involved. Obviously, this is an administrative question. However, it is my opinion that as to any school land formerly traversed by it on the abandoned line, Redfield to Gettysburg, that such payment is not justified.

Reference is directed to the full text of the involved statutes, and cases cited in **Notes of Decision**, pages 276 to 284, USCA 934.

Respectfully submitted,

Gordon Mydland
Attorney General