

OFFICIAL OPINION NO. 72-25, Title to abandoned right-of-way over land granted to the State of South Dakota pursuant to Section 10 of the Enabling Act of 1889, and for which a deed was issued by the State of South Dakota to the Chicago and North Western Ra

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

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

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Title to abandoned right-of-way over land granted to the State of South Dakota pursuant to Section 10 of the Enabling Act of 1889, and for which a deed was issued by the State of South Dakota to the Chicago and North Western Railway Company in June, 1911.

Dear Mr. Ginn:

On June 9, 1969, the Chicago and North Western Railway Company filed with the Interstate Commerce Commission its application under Section One (18) of the Interstate Commerce Act for permission to abandon its line of railroad between Winner, South Dakota and Wood, South Dakota, a distance of 33.7 miles. (Finance Docket No. 25766) On the 31st day of October, 1969, the Interstate Commerce Commission issued its certificate and order authorizing the abandonment of said segment of railroad, removing the rails, cancelling service and schedules, which abandonment is a present accomplished fact.

For purposes of clarification of this opinion, we have selected as typical, Section 16, Township 99N, Range 77 West, Tripp County, South Dakota, on which the subject segment of rail line was constructed and operated.

The rights to the right-of-way of the North Western Railroad in the school lands traversed by the segment of railroad here in issue were obtained by appropriate proceedings pursuant to SDCL 49-20-1 to 14 and identified by the plat and certificate filed with the Commissioner

of School and Public Lands pursuant to SDCL 49-20-8, under date of May 13, 1910 which reads as follows:

I, Edward C. Carter, Chief Engineer of the Chicago and North Western Railway Company, do hereby certify that the adjoining plat shows correctly the center line of the railroad of the Chicago and North Western Railway Company, as said center line is now surveyed and staked out over and across the South half of Section sixteen (1), township ninety-nine (99) north, range seventy seven (77) west of the Fifth (5th) principal meridian, in Tripp County, State of South Dakota, and also clearly indicates the boundary line of the right of way for said railroad, 50 feet in width from the center line of said railroad on each side thereof over and across the easterly four thousand four hundred and forty three (4443) feet measured along said center line and 100 feet in width from said center line on each side thereof from the westerly end of the above described right of way to the west line of said section, a distance of eight hundred, eighty-eight and eight-tenths (888.8') feet; that this map is made in pursuance of the provisions of section 510 of the revised code (civil) of South Dakota, 1903, to be filed with the Commissioner of School and- Public Lands of the State of South Dakota, and a duplicate thereof with the Register of Deeds in and for said Tripp County in said state in order to authorize said Chicago and North Western Railway Company to enter upon said land as surveyed and selected, and construct thereon its railroad, turnouts, side tracks, and other appurtenances deemed necessary for railroad purposes by said railroad company. (signed) Edward C. Carter, Chief Engineer. May 13, 1910.

Thereafter, a deed to the subject tract (which includes other tracts) on the 16th day of June, 1911, was duly issued by the State of South Dakota, containing reversion and restoration of title to grantor clauses as follows:

... the said party of the first part has given, granted, bargained, sold, conveyed and confirmed, and by these presents does give, grant, bargain, sell, convey and confirm to said party of the second part and to its successors and assigns forever, for the purpose of constructing said railroad thereon, and for all purposes connected with the construction, operation, maintenance, and use of its railroad, the following described tracts of land

. . . TO HAVE, HOLD AND ENJOY the lands conveyed so long only as they are used by the said second party for the purpose herein stated with the appurtenances and privileges thereto appertaining and the right to use the said lands, and material within the limits of the land hereby conveyed unto the said party of the second party, and to its successors and

assigns for any and all purposes connected with the construction, improvement, maintenance, operation and enjoyment of said railroad. Provided, that all valuable minerals are reserved from this conveyance and the right reserved to mine beneath the said strip of land for the purpose of removing said minerals, so far as the same can be done without impairing the safety or security of the surface or right of way herein granted to the party of the second part, provided further, that if said right of way shall be abandoned or shall cease to be used by said second party, or its assigns for the purposes herein named the title shall revert to and invest in the owner of the legal subdivision over which said right of way runs.

" IN WITNESS WHEREOF, I, R. S. Vessey, the Governor of the State of South Dakota have hereunto signed my name and the seal of the State of South Dakota to be here affixed this 19th day of June, A.D. 1911. STATE OF SOUTH DAKOTA (signed) R. S. Vessey, Governor.

The question to be determined here presented is whether upon abandonment of service and dismantling of this segment of railroad, did the rights and title to the right-of-way revert to the present owner of the subject land?

The Enabling Act of February 22, 1889 transferred to the State in trust Sections 16 and 36, and other public lands and it therefore was obvious that it became essential to provide a method for a railroad to build its lines intersecting instead of going around them. Session Laws of 1890, Ch. 61, now SDCL 49-20, is the answer to that problem.

There are two types of transfers or conveyances issued for right-of-way deeds to railroads: (a) one grants the land, and (b) those that grant a right.

There is a plethora of cases assembled in notes in the annotation. In 3rd ALR Vol. 6, pages 973 to 1039, relating to whether a deed to a railroad right-of-way should be construed as conveying a fee title or merely an easement. The cases are interesting and instructive. In this case our problems is simplified in that it was issued pursuant to SDCL 49-20-9, which reads as follows:

Deed from the Governor after construction of railroad - Payment of value. - As soon as such railroad shall be constructed over such lands, so selected, and a station erected thereon, on proof of such fact to the satisfaction of the Governor, and upon paying the full value of the lands so taken for station purposes and all grounds herein contemplated, such value to be ascertained and payment made in the manner provided in ,§49-20-12, the Governor shall convey, by deed of right of way, to the corporation constructing such railroad, the right to

hold and use such lands for such purposes only as are herein contemplated, which deed shall be executed in the name of the state by the Governor, under the great seal of the state, and attested by the commissioner of school and public lands, under the seal of his office.

Section 49-20-5 reads as follows:

Authority to use school or public lands of state - Width of right of way lands for accessory facilities. - Any railroad company authorized to construct a railway in this state may locate and construct its railway across any of the school or other public lands of the state, and may, for that purpose, hold, occupy, and enjoy a right of way therefor fifty feet in width from the center of the track of such railway on each side thereof, and such extra width as may be necessary for cuts, embankments, gravel pits and other works of such railway, or for the protection thereof from snow, subject to the approval of the Governor; and may take, hold, and occupy an amount of land, not to exceed twenty acres in anyone tract," which shall be made to conform to the subdivisions of the government surveys, for every section of ten consecutive miles of such railway, for station, depot grounds, machine shops, turnouts, sidetracks, warehouses, and other appurtenances to a railroad.

Typical statements from WORDS & PHRASES reveal as follows:

The words "deed of right of way" connotes, (a) the right to pass over land, (b) a servitude is meant, (c) the words "right of way" in a grant to a railroad company taken alone means an easement only and does not pass the land itself.

The term used in our statute "by deed of right of way" has a controlling significance, limiting the rights transferred to be that of merely an easement.

The fee title of the State held in trust under the Enabling Act of 1889 for the public purpose therein detailed may not without definite and further legislative authorization be conveyed to railroads in fee by the Governor or by state officers over which to operate its trains. **Lien v. Engineering Co.**, 74 S.D. 476.

The case of **Sherman v. Sherman, 23 S.D. 486**, is the only case in South Dakota in which the issues herein are considered. This case originated in 1887 under Territorial Statutes and was decided by a divided court, two of the judges holding by the deed there issued a fee title passed to the railroad, and one member in a dissenting opinion held that an easement

merely was conveyed by the deed. The following recital from the majority opinion, page 498, should be noted:

There is nothing in the strument in question reserving the grantors any use or dominion over the land, or any provision whereby the grantors might re-enter or resume possession in case it was not used for railroad **purposes**.

Obviously the recital above quoted in the Sherman case is the controlling reason given by the two judges who decided the Sherman case. One member of the court held it only constituted an easement.

The deed issued in this case contains a specific provision that title revert to the state upon abandonment of the railroad.

We, therefore, conclude that (1) by the Enabling Act title to this Section 15 was transferred by Congress to the state as school and public land, (2) that the deed issued to the North Western Railroad conveyed an easement only, and (3) that under the recitals of the deed, and the present applicable statutes the servitude of the easement has reverted to the present owner of record.

On the 3rd day of January, 1949, the State of South Dakota, pursuant to SDCL 5-9, conveyed by fee simple title, a patent to Elmer Peterson, a purchaser at public sale, the subject land in Section 15 which patent properly recites the existence at the time of the easement of the railroad for the right-of-way which was as of the date hereof reverted to the now owner or his transferees of this tract which was formerly occupied as a right-of-way by the North Western Railroad.

This conclusion is made necessary because the original deed to the North Western recites (1) "for use of said railroad", (2) "rights of way herein granted" and (3) "if the right-of-way herein granted shall be abandoned, title shall revert to and rest in the owner." These conditions are all limitations of the conferred powers as recited in the statutes controlling the subject at issue.

Respectfully submitted,

Gordon Mydland
Attorney General