



STATE OF KANSAS

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March 30, 1984

ATTORNEY GENERAL OPINION NO. 84- 29

Edward S. Dunn, Manager
Rural Water District No. 3
Jackson County
P.O. Box 247
Holton, Kansas 66436

Re: Waters and Watercourses -- Rural Water Districts --
Easements for Pipelines; Abandonment of Property by
Railroad

Synopsis: A rural water district organized pursuant to K.S.A. 82a-612 et seq., may acquire easements for waterlines either through purchase or eminent domain. K.S.A. 1983 Supp 82a-619, K.S.A. 82a-619b. In a situation where easements have been acquired from a railroad which has subsequently abandoned its own easement for railway purposes, the district may obtain easements from the party to whom the railroad's easement reverts (i.e. the owner of the servient estate). Cited herein: K.S.A. 1983 Supp. 82a-619, K.S.A. 82a-619b.

* * *

Dear Mr. Dunn:

As Manager of Jackson County Rural Water District No. 3, you request our opinion on a question concerning several easements which the district obtained in 1979 from the Chicago, Rock Island and Pacific Railroad Company (Rock Island). Although the railroad was in bankruptcy at the time and was being operated by a receiver, the district entered into a number of agreements

(the validity of which was not questioned) for the placing of waterlines across property of the railroad. Subsequent events, however, have called into question the continuing authority of the Rock Island to grant such easements, or to enforce those previously made.

Specifically, you indicate that in 1983 the district received notice from the railroad that five different easements would be terminated unless a new agreement could be reached as to the compensation received by the railroad. Although it can be questioned whether the interests received by the district are easements (as the district intended upon payment of the "lump sum" set by the Rock Island) or mere licenses (as now interpreted by the railroad), the instruments themselves indicate that either party may terminate them upon 30 days notice. Such notice having been given by the Rock Island, the only remaining question concerns whether the railroad's actions have resulted in an abandonment of whatever right of way interest it possessed.

There are numerous Kansas decisions which have dealt with the subject of abandonment of railroad lines, perhaps because of the pre-eminent position which railroads held in the development of this state during the nineteenth century. A basic description of the property interest involved is found in Harvest Queen Mill & Elevator Co. v. Sanders, 189 Kan. 536 (1962), where the court stated at pages 541-42:

"We have held that when land is devoted to railroad purposes it is immaterial whether the railway company acquired it by virtue of an easement, by condemnation, right-of-way deed, or other conveyance. If or when it ceases to be used for railway purposes, the land concerned returns to its prior status as an integral part of the freehold to which it belonged prior to its subjection to use for railway purposes. (Federal Farm Mortgage Corp. v. Smith, 149 Kan. 789, 792, 89 P.2d 838.) This court has uniformly held that railroads do not own fee titles to narrow strips taken as right-of-way, regardless of whether they are taken by condemnation or right-of-way deed. The rule is in conformity with this state's long-standing public policy and gives full effect to the intent of the parties who execute right-of-way deeds rather than going through lengthy and expensive condemnation proceedings. (Citations omitted)"

In determining whether a railroad right-of-way has been abandoned, Kansas courts follow what is called the "unitary rule" in which both intent to abandon and action to carry out that intent must combine. Martell v. Stewart, 6 Kan.App.2d 387 (1981). While intent can be shown through actions, such as removal of tracks, mere non-use is not enough. Pratt v. Griese, 196 Kan. 182 (1966).

Actions which have been held to constitute abandonment include removal of tracks and ties, non-payment of taxes and attempts to sell the interest held by the railroad. The first of these actions was present in the Pratt case, supra, where the court found that such steps rendered the operation of a railroad impossible. 196 Kan. at 185. Payment of taxes was found in Martell, supra, to be indicative of an intent not to abandon, while attempts at sale (which show an opposite intent) were present in the cases of Abercrombie v. Simmons, 71 Kan. 538 (1905), Pratt, supra, and cases from other jurisdictions set out at 95 A.L.R.2d 468, §10.

As you relate the facts here, the Rock Island has removed the rails and ties along the involved sections of line, and has sold at least two of the bridges. Further, the railroad attempted (in July of 1983) to sell its right-of-way to adjoining landowners, and in a few cases was successful in so doing, leaving non-contiguous pieces where there had once been a railroad right-of-way. While payments on taxes have been made, we are not informed whether the amounts tendered cover all of the railroad's property, or only portions.

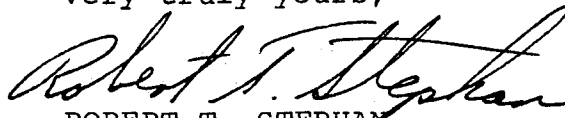
The determination of whether a railroad has abandoned a right-of-way to the adjoining landowners is clearly a question of fact which should be decided by a court of law. Accordingly, while we are able to set out for you the legal principles which courts have applied in ruling on such cases in the past, we are unable to render an opinion in the same manner that a court would. However, based on the above, the district may well wish to consult with counsel prior to paying additional amounts to the Rock Island, for if abandonment has occurred, the potential for a double payment (one to the railroad, one to the adjoining landowner) could result.

In conclusion, a rural water district organized pursuant to K.S.A. 82a-612 et seq., may acquire easements for waterlines either through purchase or eminent domain. K.S.A. 1983 Supp. 82a-619, K.S.A. 82a-619b. In a situation where easements have been acquired from a railroad which has subsequently abandoned its own easement for railway purposes, the district may obtain

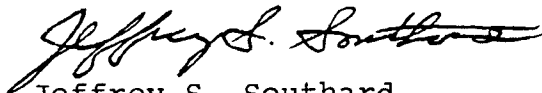
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easements from the party to whom the railroad's easement reverts
(i.e. the owner of the servient estate).

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:crw