WHAT IS MY PURPOSE? ALLOWABLE USES OF RAILROAD EASEMENTS FOR UTILITY LINES

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I. INTRODUCTION

Throughout the nineteenth century, the United States was rapidly expanding westward.[1] In the 1860s, the federal government, to encourage this expansion, began granting large amounts of land to railroad companies.[2] This gifting of land allowed the railway system to undergo vast expansion, connecting the country through these lines.[3] After a decade, however, public sentiment against these land grants forced the government to look at changing its policy.[4] The public became frustrated with the excessive amount of land being given to these companies, and wanted a different solution.[5]

In 1875, Congress enacted the General Railway Right of Way (General Railway) Act.[6] This Act ended the government's fee simple land grants, and forced companies previously granted land to quickly build railways or risk losing their land rights.[7] While early Supreme Court rulings found the government had only granted land in limited fee, the Court, in later rulings, found the General Railway Act granted land more akin to that of an easement.[8] Following a number of court cases since, it is now generally accepted that these easements are for "railroad purposes"; however, there is no clear consensus of what constitutes a railroad purpose.[9]

The primary issue since these interests were granted has been that the railroad companies have been granting apportionments of their easements to third parties, majority of which are utility companies. Using existing easements allows

1. *See Westward Expansion*, HISTORY.COM (Sept. 30, 2019), https://www.history.com/topics/westward-expansion/westward-expansion [https://perma.cc/3XFV-MLSV].

2. *Railroads, Federal Land Grants to (Issue)*, ENCYCLOPEDIA.COM (Mar. 1, 2021), https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/railroads-federal-land-grants-issue [https://perma.cc/5M2Y-NJPB].

3. *See id.*

4. *Id.*

5. *See id.*

6. 43 U.S.C. §§ 934-40.

7. U.S. DEP'T OF INTERIOR, OFF. OF THE SOLICITOR, M-37048, MEMORANDUM, at 3 (Sept. 1, 2017).

8. N. Pac. Ry. Co. v. Townsend, 190 U.S. 267, 270 (1903); Rio Grande W. Ry. Co. v. Stringham, 239 U.S. 44, 47 (1915); *see also* Great N. Ry. Co. v. United States, 315 U.S. 262, 271 (1942).

9. *See Townsend*, 190 U.S. at 270; *Stringham*, 239 U.S. at 47; *Great N. Ry. Co.*, 315 U.S. at 279.

these third-party companies to avoid the expense of negotiating with multiple individual landowners.[10]

In addition, these corridors are relatively straight, with little to no vegetation, which further decreases the cost of implementing utility lines in these areas.[11] Besides the obvious benefits to the utility companies, the apportionment of easements and fees involved has provided necessary revenue to the railroad companies who have experienced declining profits.[12]

Accordingly, the breadth of the scope of these easements has a significant impact on the landowners where these easements are located. For example, suppose a farmer owns a large amount of farmland with a 100-foot-wide railroad easement that crosses through 2,000 feet of his land. Then suppose that a telecom company has decided to lay new underground fiber optic along this easement, and the landowner now demands a contract to allow this line to be implemented. The farmer argues this additional use of the easement constitutes a burden not contemplated at the time the easement was granted 145 years ago and demands additional compensation. This type of situation demonstrates the crux of the issue being experienced by the parties involved with these easements.

Additionally, one of the of the primary difficulties of resolving these issues boils down to the different language used when railroads acquired these rights and determining now the intent.[13] Though much of the railroad's land interests were granted by government acts in the 1860s and 1870s, many other land interests were negotiated with individual landowners.[14] These easements granted from landowners used varying language and granted different levels of interest in the land. While many types of interests were granted in the land, this Note will primarily focus on the types of interests granted by the federal government in the General Railway Act.

Today, states vary widely on their interpretations of what rights were conveyed in the General Railway Act. The following pages will examine the

10. Jeffery M. Heftman, Note, *Railroad Right-of-Way Easements, Utility Apportionments, and Shifting Technological Realities*, 2002 U. ILL. L. REV. 1401, 1411 (2002).

11. *Id.*

12. *See id.* at 1410-11.

13. John O. Dryud, *Railroad Rights of Way – Types of Interests Acquired – Maryland and Pennsylvania Railroad Co. v. Mercantile-Safe Deposit and Trust Co*., 22 MD. L. REV. 57, 61-62 (1962), https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi? article= 1823&context=mlr [https://perma.cc/HR4W-T6DY].

14. *Railroad Land Grants*, KAN. HIST. SOC'Y (Aug. 31, 2021, 4:09 PM), https://www.kshs.org/kansapedia/railroad-land-grants/16718 [https://perma.cc/8D8U-YVVV].

history of these government granted property interests which lead up to the General Railway Act and Supreme Court rulings that have clarified what rights the railroad has in the land under and around its track. However, as many rights remain unclear, lower court interpretations will be examined as well, which will show the range of interests these railroad companies have depending on the jurisdiction. The importance of having a standard that the entire country can follow is paramount to ensuring the public's continued ability to benefit from the efficiency created by these rail corridors. By looking at the history of the General Railway Act and researching both federal and state court decisions, a new standard will be proposed that would allow these easements to be available for any public utility so long as the additional burden on the landowner is minimal and the third party's facilities provide a measurable use to daily railroad operations.

II. BACKGROUND

In 1825, the Erie Canal was completed and the economic benefits of linking the agricultural and industrial inlands to coastal waters quickly became obvious.[15] The evident economic benefits resulted in the federal government granting every state federal aid to construct transportation corridors.[16] Soon after, a series of canals were built linking the Atlantic Ocean to the Mississippi River.[17] The federal programs aiding this construction issued grants to canal companies and states that would, in turn, sell a portion of the land to the general public.[18] The canals would then be funded by proceeds of sales.[19] Although large amounts of land were given away, the parcels retained by the federal government saw significant appreciation of value due to their proximity to the transportation created.[20] The appreciation of the land the government kept compensated for the value of parcels given away and provided the additional benefit of not being responsible for the work itself. Similar federal tactics regarding the construction of railroad systems in the United States stemmed from the beginning successes of this program.[21]

15. *See* PAUL GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 343 (1968); Danaya C. Wright & Jaffrey M. Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements for the Nineteenth to the Twenty-First Centuries*, 27 ECOLOGY L.Q. 351, 366 (2000).

16. *See* Wright & Hester, *supra* note 15, at 371-72.

17. *See id.* at 366.

18. *See id.* at 365.

19. *See id.* at 366.

20. *Id.*

21. *See id.* at 378.

III. EXPANSION OF RAILROADS

In the nineteenth century, the United States tripled in geographical size.[22] To connect and settle the newly vast country, the United States turned to railroads.[23] Railroads received tremendous government subsidies in the form of federal and state land grants, government bonds, tax abatement, favorable legislation, and eminent domain powers. Although canals and railroads are owned by private corporations, they provide great public benefit.[24] However, issues arose because of the massive amount of federal aid.[25] Critics asserted that the federal government lacked the power "under the Constitution to turn federal lands over to private ownership for internal improvements, even though no one questioned Congress's power to authorize construction of these roads directly."[26] Although various issues arose between the federal and state governments granting these lands, railroads and canals were ultimately given right-of-passage over all public lands.[27]

In 1852, Congress passed "An Act to grant the Right of Way to all Rail and Plank Roads and Macadamized Turnpikes passing through the Public Land belonging to the United States," which gave 100-foot rights-of-way to railroads through all public lands and authorizing railroads to remove stone, earth, and timber for adjacent public lands to states.[28] At the time, most states did not have funds to construct their desired railroad systems, so states would pass this land on to the railroad companies.[29] Throughout the following decade, states used this legislation to obtain over 27.8 million acres for 50 railroads, with a total length of 8,647 miles.[30]

The push for an increase in railways—especially the construction of a transcontinental railroad—reached its height by the 1860s.[31] The West was still the

22. Guillaume Vandenbroucke, *The U.S. Westward Expansion*, 49 Int'l Econ. Rev. 81, 81 (2008).

23. *See* William S. Greever, *A Comparison of Railroad Land-Grant Policies*, 25 AGRIC. HIST. 83, 90 (1951), https://www.jstor.org/stable/pdf/3740821.pdf?refreqid=excelsior%3A4412ac23cd71adf0938654e8fa2cbce3 [https://perma.cc/WP36-QBVE].

24. *See* Wright & Hester, *supra* note 15, at 365.

25. *Id.* at 367.

26. *See id.*

27. *Id.* at 368.

28. Act of Aug. 4, 1852, ch. 80, 10 Stat. 28.

29. Wright & Hester, *supra* note 15, at 369.

30. GATES, *supra* note 15, at 362.

31. Kayla L. Thayer, Comment, *The 1875 General Railway Right of Way Act and* Marvin M. Brandt Revocable Trust v. United States*: Is This the End of the Line?*, 47 U. PAC. L. REV. 75, 79 (2015).

"great, unchartered frontier, but the California Gold Rush created an increasing demand for railways to connect the Pacific Ocean to the rest of the country."[32] Additionally, the country was in the middle of the Civil War and the northern states saw an urgent need for the "construction of said railroad . . . to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon."[33] To speed up construction on these necessary railways, Congress decided to skip a step by cutting the states out of the process, and began granting land to private railroad companies directly.[34]

The Pacific Railroad Act of 1862 was the first of these major federal land grant programs.[35] This program granted railroad corporations "alternating plots of land adjacent to the right-of-way for every mile of railway constructed, in addition to the tract for the right-of-way itself."[36] The Pacific Railroad Act of 1862 conveyed "the *right and title* to said lands to said [railroad] company for each 40 miles of railway completed, with the exception of mineral lands."[37] This method of granting alternating sections of land is commonly referred to as "checkerboard" grants.[38] This particular program was modified several times over the decade, granting more than 175 million acres of land to the railroads by 1871.[39] In total, railroad companies at this point had some form of property rights to nearly 10% of the land in the continental United States.[40]

While these land grants originally had wide public support, public opinion shifted by the 1870s because of the negative consequences of these Acts.[41] Large amounts of developable land had been granted to these railroad companies, yet much of it was not being put to use.[42] In areas where railways were completed, settlers often had trouble finding available land.[43] Because of this, many

32. Wright & Hester, *supra* note 15, at 372.

33. Thayer, *supra* note 31, at 79 (The Pacific Railroad Acts of 1862, ch. 120, 12 Stat. 489, 492).

34. *Id.*

35. *Id.* (citing The Pacific Railroad Acts of 1862, ch. 120, 12 Stat. 489).

36. *Id.* (citing The Pacific Railroad Acts of 1862, ch. 120, 12 Stat. 489).

37. *Id.* (citing The Pacific Railroad Acts of 1862, ch. 120, 12 Stat. 489).

38. *Id.* at 79 n.32.

39. *Id.* at 80 (citing The Pacific Railroad Act of 1863, ch. 112, 12 Stat. 807; The Pacific Railroad Act of 1864, ch. 216, 13 Stat. 356; The Pacific Railroad Act of 1865, ch. 87, 13 Stat. 504; The Pacific Railroad Act of 1866, ch. 124, 14 Stat. 66; Greever, *supra* note 23, at 84).

40. *Id.* (citing Greever, *supra* note 23, at 83).

41. *Id.*

42. *Id.* (citing Greever, *supra* note 23, at 84).

43. *Id.* (citing Greever, *supra* note 23 at 84).

individuals wishing to settle land in the west had to either wait until the railroads claimed the land through construction or forfeited it.[44] Due to public outcry, Congress discontinued their policy of checkboard grants.[45]

However, there still existed the need for railway expansion, so Congress, in 1875, enacted the General Railway Act.[46] The General Railway Act continued to excessively grant railroad rights-of-way; however, checkerboard parcels were no longer handed out.[47] Additionally, railroad companies were required to file profiles of the rights-of-way within one year and finish construction within five years or risk forfeiture of the land grant.[48] After the General Railway Act passed, railroad companies continued to receive property rights from the federal government. Many new land rights, however, were individually negotiated with landowners to include routes needed to cross private property.[49]

Since land rights were granted to railroads, the rights-of-way have been apportioned to companies for a variety of reasons but most notably to utility companies.[50] At first, they were used by telecommunication companies to lay telephone cable and eventually fiber-optic cable.[51] Oil and gas companies have also negotiated contracts to lay cable or pipe along these railway corridors.[52] The railroad companies' granting of land rights for these various uses is the reason for the issues the courts face today.

44. *Id.* (citing David Maldwyn Ellis, *The Forfeiture of Railroad Land Grants, 1867-1894*, 33 MISS. VALLEY HIST. REV. 27, 30 (1946), https://www.jstor.org/stable/pdf/1896734.pdf?refreqid=excelsior%3A7c2448458e49ec59da2f678414f128d9 [https://perma.cc/6TMB-W755]).

45. *Id.* (citing Ellis, *supra* note 44, at 40).

46. *See* 43 U.S.C. §§ 934-40.

47. *See generally id.* § 934.

48. Id. § 937.

49. *See generally Federal Railroad Right of Ways*, EVERYCRSREPORT (May 3, 2006), https://www.everycrsreport.com/reports/RL32140.html [https://perma.cc/5G48-GCVC].

50. *See, e.g.*, Pac. Postal Tel. Cable Co. v. W. Union Tel. Co., 50 F. 493 (C.C.D. Wash. 1892); Mellon v. S. Pac. Transp. Co., 750 F. Supp. 226 (W.D. Tex.1990).

51. *See* Heftman, *supra* note 10, at 1416.

52. *See generally* Barahona v. Union Pac. R.R. Co., 881 F.3d 1122, 1129 (9th Cir. 2008).

IV. PROPERTY RIGHTS OF RAILROADS

Property interests granted by the government and private landowners varied greatly. Depending on the conveyance, railroads were granted a wide scope of interests from fee simple to licenses to operate.[53] The federal government distributed land through a variety of methods, as previously shown in this Note.[54] Landowners' contracts with railroad companies depended on what suited their needs and conditions, such as requiring promises regarding construction of the line within a certain timeframe, providing fencing, and providing a certain type of rail service.[55] Due to the wide spectrum of interests amongst landowners, railroads held a variety of land interests; however, the railroad would use a fee simple absolute deed and modify it for individual owners based on their conditions to create a defeasible fee.[56] Easement language was rare because it did not permit the easement hold to have exclusive rights in the land.[57] Privately negotiated land interests, therefore, have a wide range of interests and language.[58] However, this Note will not focus on the interpretation of such private contracts.

The property rights granted by the federal government before legislation in 1971 and 1975 have less variance. As discussed later in greater detail, the Supreme Court has held that land grants authorized before 1971—in respect to the railroad corridor—created a defeasible fee interest without the mineral rights underlying these corridors.[59] The General Railway Act was interpreted to grant exclusive easements, which included subsurface rights but not mineral rights.[60] While courts allow the railroads to acquire any interest through private grants, "where land is acquired by the railroads through operation of law or state action, they may be limited to only the minimum property interest necessary for their purposes."[61] However, determining this exact interest entails rules of deed construction that vary dramatically from state to state.[62] Even though courts see these land rights as easements, they consistently recognize the easements to be "bigger, more extensive, and exclusive as against the fee owner than most private easements and

53. Wright & Hester, *supra* note 15, at 377.
54. *See id.* at 380-84.
55. *Id.* at 377-78.
56. *Id.* at 378.
57. *See id.*
58. *See id.* at 379.
59. N. Pac. Ry. Co. v. Townsend, 190 U.S. 267, 271-72 (1903).
60. Great N. Ry. Co. v. United States, 315 U.S. 262, 271-72 (1942).
61. Wright & Hester, *supra* note 15, at 380-81.
62. *See id.* at 381.

public utility easements."[63] The question then becomes: do these railroads have the power to grant licenses or sub-easements to third parties?

V. "INCIDENTAL USE" DOCTRINE

The railroad companies' power to create easements for utilities has caused frequent litigation throughout the years, as the landowners on impacted by these rights-of-ways argue the apportionment exceeds the scope of what was granted.[64] The Supreme Court has addressed some of these questions, but much of the interpretation is still being determined by each state.

In *Grand Truck Railroad v. Richardson*, the Court examined whether structures not used exclusively for the railway track could be located on railroad rights-of-way.[65] The Court found:

> [I]t must be admitted that a railroad company has the exclusive control of all the land within the lines of its roadway . . . we are not prepared to assert that it may not license the erection of buildings for its convenience, even though they may also be for the convenience of others . . . . Such erections would not have been inconsistent with the purposes for which its charter was granted. And, if the [railroad] might have put up the buildings, why might it not license others to do the same thing[?][66]

The *Grand Truck Railroad* Ruling created the incidental use doctrine commonly used by local courts when examining what constitutes a proper use of these railroad easements.[67] At the time, interpretation of this doctrine focused on the use of the telephone and telegraph, which was necessary for the function of a railroad line.[68] Naturally, when a deed granted rights-of-way to railroad companies, it was assumed that the scope of land interest would allow for the laying of necessary wires.[69] Moving forward, the rail corridors acquired through

63. *Id.* at 387-88.

64. *See* Home on the Range v. AT & T Corp., 386 F. Supp 2d 999, 1001 (S.D. Ind. 2005); Miss. Invs., Inc. v. New Orleans & N.E.R. Co., 188 F.2d 245, 247 (5th Cir. 1951); Long Beach v. Pac. Elec. Ry. Co., 283 P.2d 1036, 1037-38 (Cal. 1955); Mitchell v. Ill. Cent. R. Co., 51 N.E.2d 271, 272-73 (Ill. 1943).

65. *See* Grand Truck R.R. v. Richardson, 91 U.S. 454, 468 (1875).

66. *Id.* at 468-89.

67. *See id.* at 472.

68. *See* Cater v. Nw. Tel. Exch. Co., 63 N.W. 111, 113 (Minn. 1895).

69. *See* St. Louis, I.M. & S. Ry. Co. v. Cape Girardeau Bell Tel. Co., 114 S.W. 586, 587 (Mo. Ct. App. 1908).

the General Railway Act granted railroad companies the ability to grant easements for telegraph and telephone cable for railroad use.[70]

A. Telecommunication Companies Utilizing Incidental Use

The effects of *Grand Truck Railway* in allowing the proliferation of telegraph and telephone cable across the country cannot be understated. In the nineteenth century, stations communicated with one another primarily through telegraph lines.[71] Lines were constructed on their railway easements by the railroad company themselves or by a third party, such as Western Union.[72] For this investment to be worthwhile to third parties, however, the lines needed to provide services to the public as well.[73]

This public need is the very reason the government stepped in. As telegraph services became a public necessity, Congress and various states recognized the need for railroad corridors, and, noting the most efficient locations for new lines, went as far as granting eminent domain powers to telegraph companies.[74] Through this grant of power, telegraph companies were able to force the railroads to allow them access to their corridors.[75] Further, "courts uniformly held any exclusivity provisions in the railroad's contract with the established telegraph company void as against public policy," and noted that additional lines on these poles added only a nominal burden on the land.[76] Because of these policies, telegraph companies could simply exercise eminent domain against the railroad when they wished to expand their services.[77]

However, the question remained whether railroads could grant these rights to the telegraph or telephone companies when the third party would be using part of the line for the public, rather than railroad operations.[78] Following *Grand Truck*

70. *See id.*

71. Tomas Nonnenmacher, *History of the U.S. Telegraph Industry*, ECON. HIST. (Aug. 24, 2021, 8:12 AM), https://eh.net/encyclopedia/history-of-the-u-s-telegraph-industry/ [https://perma.cc/XNY5-WM8W].

72. Wright & Hester, *supra* note 15, at 416; *see* W. Union Tel. Co. v. Postal Tel. Co., 217 F. 533, 537-38 (9th Cir. 1914); Pac. Postal Tel. Cable Co. v. W. Union Tel. Co., 50 F. 493, 495 (C.C.D. Wash. 1892).

73. Wright & Hester, *supra* note 15, at 416.

74. *Id.* at 416-17; *see* The Pacific Railroad Acts of 1862, ch. 120, 12 Stat. 489; FLA. STAT. § 362.02 (2021).

75. Wright & Hester, *supra* note 15, at 416-17; *see* The Pacific Railroad Acts of 1862, ch. 120, 12 Stat. 489; FLA. STAT. § 362.02 (2021).

76. Wright & Hester, *supra* note 15, at 416-17.

77. *Id.* at 417.

78. *Id.*

Railway, the majority view is that railroad companies do have this power. The Eighth Circuit held in *Northern Pacific Railway Company v. North American Telegraph Company* the following:

> [a] railway company, which has become the owner of a railroad which it is operating and of a right of way appurtenant thereto, has the exclusive right to the use of that right of way for telegraph purposes as well as for railroad purposes. If after the application of so much of the use thereof as the maintenance of its own railroad and telegraph requires there remains a surplus use of that right of way either for telegraph purposes or for railroad purposes, it may lease or permit that use, or any part of it, for a valuable consideration for any purpose which does not interfere with its operation of its own railroad and telegraph and its discharge of its duties to the public so to operate them. This right of a railroad company to lease or permit the surplus use of its right of way, or of its property, is its private property and it is often very valuable property.[79]

However, there were still some states unwilling to give railroad companies so much control over their easements. According to the Tennessee Supreme Court, railroad companies "cannot license the appropriation of . . . such right of way to private business purposes, nor to public purposes, except so far as needful, and helpful to the operation of the road itself."[80] A more recent Tennessee Supreme Court ruling noted that these lines—when used for purely commercial purposes—undoubtedly create an additional burden on the landowner, so the landowner must be compensated.[81]

Aside from a few exceptions like Tennessee, most states hold that if the telegraph line on telephone poles is used for both a railroad and a commercial operation, no additional servitude is created, and the railroad company may grant such utility easements.[82] These two uses—both vital to public interest—became prevalent in much of the country, and the nation gained the economic advantage of dual development.[83] Today, though telephone cables are no longer required to run railway operations, this doctrine implies the use of communication lines were contemplated at the time of granting.[84] Because of the assumption that easements allowed telegraph cables, it is argued—regardless of their necessity—that

79. N. Pac. Ry. Co. v. N. Am. Tel. Co., 230 F. 347, 349 (8th Cir. 1915).
80. Mobile & O.R. Co. v. Postal Tel. Cable Co., 46 S.W. 571, 572 (Tenn. 1898).
81. W. Union Tel. Co. v. Nashville, C. & St. L. Ry. Co., 237 S.W. 64, 65 (Tenn. 1922).
82. Heftman, *supra* note 10, at 1419.
83. *Id.* at 1415.
84. *See id.* at 1416.

communication lines, and possibly lines for other utilities, are an acceptable use for these easements.[85]

B. Rails to Trails

A recent 8-to-1 Supreme Court decision analyzed the General Railway Act as it relates to the federal Rails-to-Trails Act.[86] Enacted by Congress in 1983, this program allowed for "rail-banking," or the interim conversion of abandoned railway rights-of-way into public trails, while still preserving the possibility of this land to be converted back to railroad operations.[87] This program was created to incentivize the railroads to retain their right-of-way, and to discourage the railroads from reverting to underlying subservient estate, in a more cost-efficient manner.[88] More than 5,000 miles of abandoned railroad track utilized this rail-banking program as of July 2009.[89]

While this has been a heavily litigated topic, *Brandt Revocable Trust v. United States* may have opened the door to the extinguishment of these converted easements granted under the General Railway Act.[90] This case involved a landowner in Wyoming whose family received 83 acres from the government in 1976 that included a railroad right-of-way through the land.[91] By 2004, the track was abandoned and its tracks and ties torn out.[92] In 2006, the United States initiated action seeking an "order quieting title in the United States to the abandoned [right-of-way]."[93] Marvin Brandt contested this action, asserting the right-of-way was only an easement that extinguished upon abandonment of the track, while the government asserted it had retained an "implied reversionary interest" in the right-of-way.[94] This case found its way to the Supreme Court, who held the government had no reversionary interest to lands it patented to private individuals subject to the General Railway Act.[95] This meant the federal government is subject to Fifth Amendment takings liability for all current and future rail-banked General Railway Act rights-of-way for which it does not hold ownership of the underlying estate. In

85. *See id.*
86. *See* Marvin M. Brandt Revocable Tr. v. United States, 572 U.S. 93, 94 (2014).
87. Thayer, *supra* note 31, at 87-88.
88. *Id.* at 88.
89. *Id.*
90. *Marvin M. Brandt Revocable Tr.*, 572 U.S. at 110.
91. *Id.* at 98-99.
92. *Id.* at 100.
93. *Id.*
94. *Id.* at 101.
95. *Id.* at 106.

its decision, the Supreme Court pointed out the hypocrisy of the United States in relation to their argument in *Great Northern*, as the government argued "the [General Railway Act] granted an easement and nothing more."[96]

When the United States granted the land to Brandt's parents in 1976, the United States "conveyed fee simple title to that land, 'subject to those rights for railroad purposes.'"[97] Simply put, an easement for railroad purposes was the only encumbrance to the Brandt's land.[98] "Unlike most possessory estates, easements . . . may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude," or, as the Supreme Court put it, "if the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land."[99] As *Great Northern* classified these General Railway Act land grants to convey easements, the Court found their ruling of this decision resolved by basic common law principles.[100]

The Government argued *Great Northern* classified these rights-of-way as easements for only the purpose of mineral rights and it did not apply to reversionary interests.[101] The Court dismissed this argument stating, "nothing in the text of the [General Railway Act] supports such an improbable (and self-serving) reading."[102] While this ruling will likely have a huge impact on litigation concerning abandoned railroads, for the purpose of this Note, this decision undeniably shows the rights-of-way granted by the General Railway Act's conveyed easements for railroad purposes in all circumstances.

96. *Id.* at 103.
97. *Id.* at 104.
98. *See id.*
99. *Id.* at 105 (construing RESTATEMENT (THIRD) OF PROP. (SERVITUDES) § 1.2(1) (AM. L. INST. 2000)).
100. *Id.* at 106.
101. *Id.*
102. *Id.*

VI. UTILITY INVOLVEMENT AND ISSUES ARISING

The United States railway system continued to grow until 1916.[103] At the industry's height, there were 254,000 miles of railroad track spanning the United States—connecting New York to San Francisco (and everywhere in between)—which contributed to vast economic development throughout the country.[104] As automobile-use increased, however, the need for such an expansive railway system deteriorated, which resulted in only 140,000 miles of railroad track in the United States today.[105] With the decreased use of railways, companies resorted to other methods to increase their revenue stream.[106] While originally envisioned to allow the use of telephone cable, over time the railroads have expanded the leasing of easements.[107] Fiber optic, electric, and gas companies have all made use of this land to lay their infrastructure.[108] By using these railroad corridors, these utility companies avoid the need to secure countless contracts with individual landowners and the high costs associated.[109] Additionally, much of the current infrastructure being laid requires linear corridors, which railroad easements currently reside in.[110] Because of these advantages, utilities are willing to pay a premium for leases of these pre-existing easements, and in some instances these lease rates are reported as high as $25,000 per mile.[111]

However, due to uncertainty as to whether leasing utilities rights to these easements without landowner compensation is legal, the risk of costly litigation is a legitimate concern. Many telecommunication industry leaders have a significant amount of their fiber-optic cable running through these railroad rights-of-way.[112]

103. *See Chronology of America's Freight Railroads*, ASS'N OF AM. R.R. (Aug. 24, 2021, 8:06 AM), https://www.aar.org/wp-content/uploads/2020/07/AAR-Chronology-Americas-Freight-Railroads-Fact-Sheet.pdf [https://perma.cc/M7ZC-4R7C].

104. *See id.*

105. *Conditions & Capacity*, AM. SOC'Y OF CIV. ENG'RS (Aug. 24, 2021, 8:07 AM), https://www.infrastructurereportcard.org/cat-item/rail/#:~:text=The%20U.S.%20rail%20network%20is,track%20and%20over%20100%2C000%20bridges [https://perma.cc/AVQ4-J9LM].

106. *See generally id.*

107. *See* Heftman, *supra* note 10, at 1411.

108. Hynek v. MCI World Commc'ns, Inc., 202 F. Supp. 2d 831, 834-35 (N.D. Ind. 2002); *see also* Barahona v. Union Pac. R.R. Co., 881 F.3d 1122, 1125 (9th Cir. 2008).

109. *See* Heftman, *supra* note 10, at 1411.

110. *See id.*

111. *See id.*

112. *See* Brian O'Reilly, *Telecom's Real Estate Problem; This Land is Their Land. Maybe*, CNN MONEY (July 5, 1999), https://money.cnn.com/magazines/fortune/fortune_archive/1999/07/05/262417/index.htm [https://perma.cc/FY2R-D9ZH].

MCI and Sprint have more than half of their fiber optics running parallel to these easements, while Qwest placed more than two-thirds of its 20,000 miles of lines along railroad rights-of-way and other easement corridors.[113] The murkiness of the scope of these easements has already cost telecommunications companies, since railroad companies are leasing their land rights without ensuring laying line is actually permitted.[114] In 2014, Sprint, Qwest, and Level 3 were required to pay $4.2 million to subservient landowners where the companies used the railroad easement to lay fiber-optic cable.[115] In 1999, AT&T was required to pay landowners in Indiana $45,000 per mile along a 70-mile track and in 2017, Sprint, CenturyLink, WilTel Communications, and Level 3 had to settle a class action suit in Arizona at a cost of $3.1 million.[116] Even if the companies are successful, the costs of litigation are still something they would wish to avoid, which is why a standard for the scope of these easements is crucial when deciding to build lines.

VII. RAILROAD PURPOSE

Looking through 150 years of case law, whether a railroad can grant an easement to a third party comes down to whether the third party's operations provide a benefit to the railroad operations.[117] The spectrum of these railroad purposes could range from simply providing monetary benefit to the railroad to only allowing the smallest property right possible consistent with its operational needs.[118]

A. Broadest Interpretation

In its broadest interpretation, any type of revenue generating enterprise would be within the scope of the incidental use doctrine.[119] Railroads undoubtedly require money to run their business (e.g., Union Pacific's 2019 operating expenses of over thirteen million dollars), so it is argued anything that improves the

113. *Id.*

114. *Id.*

115. Roxana Hegeman, *Kansas Landowners Granted $4.2 Million Settlement in Telecom Class Action*, KAN. CITY STAR (May 16, 2014, 06:11 PM), https://www.kansascity.com/news/business/article301319/Kansas-landowners-granted-4.2-million-settlement-in-telecom-class-action.html [https://perma.cc/6YRE-S5FE].

116. O'Reilly, *supra* note 112; Chuck Stanley, *Telecoms Settle Arizona Cable Line Suit for $1.3 Million*, LAW360 (Jan. 27, 2017), https://www.law360.com/articles/885513/telecoms-settle-arizona-cable-line-suit-for-1-3-million [https://perma.cc/FWP3-PFT2].

117. *See* Thayer, *supra* note 31, at 95.

118. *See* Wright & Hester, *supra* note 15; *id.* at 92-96.

119. Thayer, *supra* note 31, at 94.

railroad's financial positions will help provide income to continue investing in their railroad operations.[120] This interpretation could then be taken to extreme levels as stated by the court in *Union Pacific Railroad Company v. Santa Fe Pacific Pipeline, Incorporated*: "If railroad purpose were defined so broadly as to encompass anything that generates revenue for the railroad, 'it would be hard to imagine anything the railroads would be unauthorized to do within the [right-of-way].'"[121]

Railroads could then shut down part of their operations and use the land to build a housing development or amusement park to increase their revenue stream and the subservient landowner would have no recourse.[122] In these examples, the subservient landowner must endure these additional burdens on their land, even though undoubtably these uses were not contemplated at the formation of the easement.

B. Strictest Interpretation

On the strictest end, if a railroad company wishes to lay a fiber-optic line, gas line, or electrical cable to assist in their operations, they must perform the work themselves as otherwise the third party assisting them could only use the infrastructure to operate the railroad.[123] Without being able to service the public and receive economic benefit from them, the laying of these lines would be financially impractical, and railroads may be more limited in their operations.[124]

120. *Id.* at 95; UNION PACIFIC CORPORATION: 2019 INVESTOR FACT BOOK, UNION PAC. CORP. (2019), https://www.up.com/cs/groups/public/@uprr/@investor/documents/investordocuments/pdf_investor_factbook_2019.pdf [https://perma.cc/E44R-9MYV].

121. Union Pac. R.R. v. Santa Fe Pac. Pipelines, Inc., 231 Cal. App. 4th 134, 167 (2014) (quoting Home on the Range v. AT & T Corp. 386 F. Supp. 2d 999, 1021, n.10 (S.D. Ind. 2005)).

122. *See* Union Pac. R.R, 231 Cal. App. 4th at 134.

123. *See* Wright & Hester, *supra* note 15, at 378.

124. *See* Sally Aman, *Dig Once: A Solution for Rural Broadband*, USTELECOM (Apr. 12, 2017), https://www.ustelecom.org/dig-once-a-solution-for-rural-broadband/#:~:text=One%20of%20the%20toughest%20roadblocks,fiber%20at%20%2427%2C000%20per%20mile [https://perma.cc/A6KQ-DXV3] ("The Department of Transportation has compiled statistics that put the average cost of laying fiber at $27,000 per mile.").

VII. STATE COURT RULING OR "STATES' INTERPRETATIONS OF LAND GRANTS"

Courts have taken different approaches resulting in differing interpretations. While many states—including Iowa—have very little clarifying case law, some have taken clearer positions on the scope of railroad easements. The following cases show various court approaches to the validity of railroads granting easements to utility companies.

A. Telecommunication

In the 1990 Texas case *Mellon v. Southern Pacific Transport Company*, a telecommunication company was granted an easement by the railroad to lay their fiber-optic lines.[125] A landowner brought suit alleging an abuse of the right-of-way, trespass to try title, inverse condemnation and conversion, and unjust enrichment.[126] The *Mellon* Court ruled in favor of the railroad, and stated,

> [T]he right-of-way surface includes the non-mineral topsoil that would be occupied by a buried [fiber-optic] line, and the [fiber-optic] cable is an authorized incidental use which is not inconsistent with railroad uses and does not burden the subservient estate retained by the Plaintiff.[127]

Applying the incidental use doctrine, the court stated "[t]he railroad may make many uses of its right-of-way including the building of side tracks, building, telegraph lines, and other structures necessary for its business . . . [t]elephone, telegraph, and interurban lines are public facilities that were contemplated by the grant of the right-of-way," and that MCI's fiber-optic cable "is the modern application of its antecedent the telegraph line."[128]

In a similar case in Arkansas, *International Paper Company v. MCI Worldcom Network Services, Incorporated*, the *Paper Company* Court noted that "[e]ven if the right-of-way is only an easement, the railway company has the right to use and possess all the land conveyed so long as any portion of the strip is used for railroad purposes."[129] The *Paper Company* Court summarized their previous case law on railroad interests into a six-part summary, which includes "(3) so long as the railroad is occupying any portion of the right-of-way, the railroad is entitled to grant licenses or easements to third parties provided the additional use may

125. Mellon v. S. Pac. Transp. Co., 750 F. Supp. 226, 228 (W.D. Tex. 1990).

126. *Id.*

127. *Id.* at 231.

128. *Id.* at 230.

129. Int'l Paper Co. v. MCI Worldcom Network Servs., Inc., 202 F. Supp. 2d 895, 900 (W.D. Ark. 2002).

reasonably be considered to be of benefit to the railroad."[130] In *Paper Company*, a portion of the cable was used for railroad communication and data transmission.[131] The *Paper Company* Court, which ruled in favor of the defendant, noted that the burden to the subservient estate was not greater than that of the previously accepted use of stringing phone lines along poles.[132]

Mellon and *Paper Company* demonstrate how various courts have utilized the incidental use doctrine to permit railroads to grant these utility easements. One early twentieth century Missouri case, however, put limits on this apportionment.[133] In *St. Louis, Iron Mountain & Southern Railway Company v. Cape Girardeau Bell Telephone Company,* the court used the example of a telegraph company that serves the railroad and the general public as a commercial enterprise.[134] According to the *Iron Mountain* Court, "in so far as the telegraph company serves the purpose of the railroad, its occupancy of the [right-of-way] easement is not an additional servitude or burden upon the fee of which [the landowner] may complain."[135] The *Iron Mountain* Court clarified their stance, stating:

> Nevertheless, in so far as the telegraph or telephone company thus rightfully occupying the right of way serves the general public as a commercial enterprise, distinct from the avocation of the railroad, it constitutes a use of the right of way easement other than for railroad purposes, and it is therefore a servitude not contemplated in the original grant and a burden upon the fee of which the adjacent owner may rightfully complain. It is obvious the transmission of intelligence by means of electricity to all the world who may be willing to pay for the service is not a railroad use, and such service is certainly not contemplated within the grant of the railroad right of way, for it is entirely disassociated therefrom.[136]

The *Iron Mountain* Court concluded that while a telegraph line used by the railroad is permitted as it serves a purpose for the railroad, any additional line

130. *Id.* at 902.

131. *Id.* at 903.

132. *Id.*

133. St. Louis, I.M. & S. Ry. Co. v. Cape Girardeau Bell Tel. Co., 114 S.W. 586 (Mo. Ct. App. 1908).

134. *Id*. at 588.

135. *Id.*

136. *Id.*

would not be permitted, as it would serve no railroad purpose and was thus not contemplated at the granting of the land interest.[137]

B. Pipeline

Fiber-optic cable is not the only type of utility line that has been challenged. In *Barahona v. Union Pacific*, an oil pipeline was in place through use of railroad easements.[138] To define a railroad purpose, the *Barahona* Court concluded a "railroad may license third parties to do what it could do itself, even if the third party benefits in addition to the railroad."[139] The *Barahona* Court stated further that "a pipeline built by Union Pacific exclusively to transport fuel to its trains would serve a railroad purpose" and "would look and function exactly like the actual pipeline, and would have exactly the same impact on the appellees' land."[140] While in some circumstances the benefit to the railroad may be so minimal or illusory so as to make the incidental use doctrine inapplicable, in this case, Union Pacific's legitimate use of the pipeline did not fall below this bar.[141]

IX. WHAT SHOULD WE DO?

The answer lies somewhere in the middle, for both "landowner and railroad interest must be balanced in order to determine the ideal definition of railroad purposes."[142] Courts have found running telephone lines, constructing structures (e.g., commercial warehouses) to facilitate delivery of freight shipped on the railroad, stringing power lines, and constructing combines bulk and retail oil facilities may all be construed to follow this guideline.[143] In a 2011 opinion, the Department of Interior stated this precedent establishes that railroads have the right to undertake a range of activities within the rights-of-way—including commercial activities—so long as the activity is "derive[d] from or furthers a railroad purpose," giving railroads broad authority to approve these types of activities within a right-of-way granted by the General Railway Act as long as it is consistent with railroad

137. *Id.*

138. Barahona v. Union Pac. R.R. Co., 881 F.3d 1122 (9th Cir. 2018).

139. *Id.* at 1135.

140. *Id.*

141. *Id.*

142. Thayer, *supra* note 31, at 95.

143. *See* Home on the Range v. AT & T Corp., 386 F. Supp 2d 999, 1020 (S.D. Ind. 2005); Miss. Invs., Inc. v. New Orleans & N.E.R. Co., 188 F.2d 245, 247 (5th Cir. 1951); Long Beach v. Pac. Elec. Ry. Co., 283 P.2d 1036, 1038 (Cal. 1955); Mitchell v. Ill. Cent. R. Co., 51 N.E.2d 271, 274 (Ill. 1943).

operations.[144] Accordingly, a valid railroad purpose must promote railroad operation without interference to those operations.

A. Examining History

Looking back through the history of the General Railway Act, the government's purpose was to benefit everyone by connecting the vast United States together to increase the ease of transportation for individuals and goods across the country.[145] In granting these easements to railroad companies, the government decided the loss of land rights to railroad companies was outweighed by the benefit the public received.[146] Recently, railroad companies have been taking advantage of these easements to lay fiber-optic cable, pipelines, and electrical lines.[147]

While both the railroad companies and the utilities benefit from the use of these easements, so does the public as Black's Law Dictionary defines a "public utility" as "a company that provides necessary services to the public, such as telephone lines and service, electricity, and water."[148] These lines not only help provide services to the public, but the cost for these services decreases due to using these easements, rather than the processes of individually working with landowners or going through eminent domain proceedings.[149] The utilities are using these easements to increase electric distribution capabilities, expand high-speed communication networks, and allow for the transportation of necessary oil and gas throughout the country.[150] Admittedly, these types of uses would not have been specifically contemplated when these land interests were handed out,

144. Off. of the Solicitor, M-37025, UNITED STATES DEPARTMENT OF INTERIOR: TEMPORARY SUSPENSION OF SOLICITOR OPINION M-37025, "PARTIAL WITHDRAWAL OF M-36964—PROPOSED INSTALLATION OF MCI FIBER OPTIC COMMUNICATIONS LINE WITHIN SOUTHERN PACIFIC TRANSPORTATION CO.'S RAILROAD RIGHT-OF-WAY" (2017).

145. *See* GATES, *supra* note 15, at 343.

146. *See* Wright & Hester, *supra* note 15, at 366.

147. Hynek v. MCI World Commc'ns, Inc., 202 F. Supp. 2d 831, 831 (N.D. Ind. 2002); Barahona v. Union Pac. R.R. Co., 881 F.3d 1122, 1125 (9th Cir. 2018).

148. *Public Utility*, BLACK'S LAW DICTIONARY (11th ed. 2019).

149. *See* Bradford Kuhn, *When Projected Eminent Domain Litigation Costs Exceed the Value of the Property Acquisition*, CAL. EMINENT DOMAIN REP. (Oct. 29, 2013), https://www.californiaeminentdomainreport.com/when-projected-eminent-domain-litigation-costs-exceed-the-value-of-the-property-acquisition [https://perma.cc/8M3N-ENP9] ; *Utilities Requesting to Increase Rates: Who, What, How, and Why,* ELECTRIC CHOICE (Aug. 24, 2021, 8:14 AM), https://www.electricchoice.com/blog/utilities-requesting-rate-hikes/ [https://perma.cc/ZJD7-T8R4].

150. *Hynek*, 202 F. Supp. 2d at 838; *Barahona*, 881 F.3d at 1134.

however, the Supreme Court in *United States v. Denver & Rio Grande Railroad Company* held the following:

> [w]hen an act, operating as a general law, and manifesting clearly the intention of congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations, as an inducement to undertake and accomplish great and expensive enterprises or works of a [quasi-public] character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted.[151]

Because the General Railway Act was clearly created for the public advantage, using a "liberal construction," courts should allow a wider variety of uses to be deemed railroad purposes than those in a traditional sense; however, limits are still necessary.[152]

As shown in the previous decisions by individual state courts, the facilities of the third party are often used primarily by the railroad companies for actual railway operations.[153] Whether it is providing oil to their engines, powering their stations, allowing communication along the line, or allowing companies to build warehouses—provided they use the railroad for shipment—typical railroad operations must benefit from the use. Using this standard, simply allowing any type of revenue generating activity would not be allowed.

However, the standard only requires public utilities to partially contribute to the railroad and is therefore still too broad. When created, these easements contemplated the laying of railroad tracks across the land, necessary infrastructure, and the associated train traffic.[154] Through subsequent case law, it is clear telegraph cables and the required poles for communication along the track were included in these rights-of-way.[155] This was clearly expressed in *Fort Worth & Rio Grande Railway Company. v. Southwestern Telegraph & Telephone Company*, in which the court stated:

151. United States v. Denver & R.G. Ry. Co., 150 U.S. 1, 14 (1893) (citing Bradley v. New-York & New-Haven R.R., 21 Conn. 294 (1851)).

152. *See id.*

153. *See* Mellon v. S. Pac. Transp. Co., 750 F. Supp. 226, 228 (W.D. Tex. 1990); *Hynek*, 202 F. Supp. 2d at 836; *Barahona*, 881 F.3d at 1122.

154. *See* 43 U.S.C. §§ 934-940.

155. *See* Fort Worth & Rio Grande Ry. Co. v. Sw. Tel. & Tel. Co., 71 S.W. 270, 272-74 (Tex. 1903).

> Telegraph lines were in existence upon rights of way of railway companies throughout the country, and it was common knowledge that they did not impede, but rather facilitated, the business of the carriers. Whatever might be the effect of the construction of great numbers of such lines along railroads, there has not been at any time such conditions existing in this state as to cripple or impede the carrying business, and to call for closer restrictions by legislation upon the rights granted to telegraph companies. So general has been the opinion that telegraph lines can exist upon the rights of way of railroad companies . . . .[156]

Hanging additional cables, or allowing these cables to be buried underground, would add a minimal burden to the land not contemplated in the General Railway Act, yet provides substantial public benefit, the overarching purpose of the Act. However, in the interest of the landowner, there still must be a limit on types of third-party facilities allowed. Electric substations or generating plants, for example, may still contribute to the powering of the railroad but these facilities would burden the land far beyond what was originally contemplated. Therefore, any interpretation of which railroads may grant the sub easements must balance any additional burden on the subservient landowner.

B. Proposed Rule

These arguments result in a two-part test that should be implemented when determining the validity of a granted easement in a railroad right-of-way. The activity of a third party on granted easement needs to: (1) place no more than a minimal additional burden on the subservient landowner than what was contemplated at the formation of the land interest; and (2) have at least measurable use in typical railroad operations.

This test allows for utilities to continue using the more efficient and cost-saving strategy of placing lines in these corridors as long as there is at least a portion of line used to assist typical railroad operation. Warehouses and other structures would still pass this test, even if placing an added burden to the landowner, structures like this used by railroads were contemplated at the time of the easement granting. Constructing 150-foot-high electric transmission towers along the corridor would fail this test; while 30-40-foot-tall wooden telegraph poles may have been expected to use these easements, these modern-day behemoths would not have. However, those same transmission lines buried under the ground would be acceptable if at least a portion, regardless of how small, of the electricity being transported by the lines is used by the railroad. This approach would create a happy medium that would further public benefit and not duly

156. *Id.* at 274.

infringe on the subservient landowner's rights, while avoiding extreme interpretations of a railroad purpose and remain consistent with Supreme Court rulings.

X. CONCLUSION

Providing a standard of what constitutes a railroad purpose is crucial to both the landowner and the railroad company. The General Railway Act granted thousands of miles of rail corridors across the United States, cutting through cities, towns, and farms. These tracks transport all types of goods quickly across the country, cutting down traffic and emissions.[157] A railroad's ability to grant these easements provides revenue that allows the companies to remain profitable and operational, ensuring the benefits of rail transportation remain. However, the right of the landowners must be protected. Farmers who have railroad easements crossing their land need to have the peace of mind that the railroad companies do not have free reign to use the land however they see fit.

The last party that must be considered is the public. The land grant acts in the 1800s had the public's interest in mind by helping connect the country, providing substantial economic benefit to many. The proposed rule presented in this Note draws upon the history of land grants leading up to the General Railway Act, the General Railway Act's implementation, and case law to find an elegant solution to balance the interests of the railroad, the land owner, and the public, while staying true to legislative intent.

157. *Railroads Strive to Reduce the Carbon Footprint and Increase Sustainability*, NAT'L R.R. MUSEUM (Aug. 24, 2021, 8:11 AM), https://nationalrrmuseum.org/blog/railroads-strive-to-reduce-the-carbon-footprint-and-increase-sustainability/ [https://perma.cc/BT7P-P6F6].