THE FREEMAN
Ideas On Liberty
DECEMBER 2004

The Dark Secrets of Rail Trails

by Kirk Teska

Linda Rowley lives in rural western Massachusetts on her family's homestead in a house built in the 1750s. She remembers trains running through the property when it belonged to her great-grandparents. But long before she took possession, the tracks were removed. Nevertheless, she has been reminded of those tracks—and not pleasantly.

Rowley estimates she spent well over $300,000 and six years fighting an effort to build a bicycle path across her land where those trains once ran. She even gave up her nursing job to devote time to her battle. She eventually won, although a large majority of the townsfolk of Williamsburg (pop. 2,400) had voted for the project.

The attempt to place the bike path on Rowley's and other properties in Massachusetts was spearheaded by the Rails-to-Trails Conservancy, a nonprofit advocacy organization based in Washington, D.C., with a singular mission: to convert abandoned railroad beds to public bike trails. To date, the work of the Conservancy's 100,000 members has succeeded. Its website boasts of having achieved over 12,500 miles of trails around the country, with hopes for a total of 15,000 by year's end.[1] As Conservancy president Keith Laughlin pointed out in testimony before a House committee in 2002, the $2.655 billion cost (since 1992) for roughly 1,000 trails in all 50 states has been paid for with federal, state, and local tax dollars.[2]

The Conservancy's work, however, has invited opposition from property owners. In 2002 the U.S. assistant attorney general for environment and natural resources, Thomas L. Sansonetti, told Congress that 17 pending rail-trail court cases involved 4,550 claimants across the country, resulting in a possible exposure of over $57 million.[3]

That was not the first time Congress was warned about the cost. In 1998 Nels Ackerson, whose law firm regularly represents private landowners who have had their land taken for this use, told a House subcommittee that trails conversion has become "a vast program for the quiet confiscation of land." He said the "real beneficiaries [of the] seamy process" are not hikers and bikers, but railroads and utilities. "Railroads, not landowners, are paid for the landowners' property. Utilities and others who are given licenses by the railroads or trails' sponsors to use the property get bargain prices. . . . Meanwhile, the true landowners receive nothing, not even a notice or a thank you," Ackerson said. Thus the program has "created a blank check drawable from the account of the U.S. Treasury and payable to private companies and individuals who have the power to make decisions that may cost the taxpayers hundreds of millions of dollars or more."[4]

Kirk Teska (kirk@iandiorio.com) is a freelance writer, patent attorney, and adjunct professor of law.

The claimants' beef? Although each case is different, the Rails-to-Trails Conservancy's mission of converting abandoned railroad beds into bicycle trails assumes they can be legally converted. The problem with this assumption is that abandonment of a rail bed often means the property should revert to the private landowner from whom the railroad took it in the first place.

This basic property-law principle is clear at least to some courts involved in rail-trail cases. When a landowner has land taken by the government for a railroad easement and the easement later is abandoned, the landowner (or more typically his or her successors) again owns the land outright. In property-law parlance, an easement across someone's property, once abandoned, is extinguished, or ceases to exist. The reason is that easements are messy and thus somewhat disfavored in the law, and in any case, an easement is a right of use only, not a right of possession. This is why some rail-trail opponents, like Rowley, have stopped trails in their tracks.

How It All Started

In 1866 the Massachusetts legislature allowed the New Haven and Northampton Railroad to obtain an easement over land Rowley now lives on. In 1962 the railroad ceased operating, and in 1971 the Massachusetts Electric Company acquired its land. The electric company then allowed the Conservancy to construct a rail trail on the land. Rowley and many others like her were not pleased and fought the company and the Conservancy in court. In the end, the Massachusetts Supreme Judicial Court had little trouble holding, under state law, that when the railroad ceased operating, its easement was extinguished. That meant the electric company acquired nothing and therefore could not allow the Conservancy to construct a rail trail.

Today, Rowley's case is settled and she has clear title to her land. But she still worries about eminent-domain proceedings against her and other homeowners whose land is targeted by rail-trail advocates.

Her case is not an anomaly. The U.S. Supreme Court heard the case of Paul and Patricia Preseault of Vermont, who owned land along Lake Champlain through which a railroad once ran. When that land was earmarked for a rail trail, the Preseaults sued and were ultimately awarded $1.5 million in damages, including legal fees.

To understand the full implication of these and similar cases, one has to understand the history of the U.S. rail system and its ultimate demise. In the 1800s railroads were thought to be important enough that Congress and many states gave public lands and, later, easements over public lands to the railroads. Certain states also gave them the power to take private land. Sometimes a railroad would buy the private land outright (called a "fee simple estate" in property law); sometimes only an easement was purchased; and sometimes it was unclear: a transfer from a farmer or other landowner to a railroad might use words like "fee simple," indicating an outright purchase, but also words like "right of way" and "for railroad purposes," indicating the purchase of an easement only. In addition, the law of some states seemed to limit the railroad's purchases to easements only, irrespective of the wording.

In any case, the result was over a quarter of a million miles of railroad tracks in the United States by 1920. By 1989, 50 percent of the rails were abandoned.[5] Someone apparently noticed that the railroads' abandonment of their easements across private land could result in a reversion to the owners. What happened next was a concerted attempt to prevent that.

In 1976 Congress first recognized a problem with reversion: the expense of reacquiring rail corridors, should they be needed in the future, would be considerable. So the concept of "rail banking" was born, and a complex system of laws was passed essentially to prevent a court from finding that a railroad had abandoned an easement across private land. If an easement could not be ruled abandoned, it could be later used for a commuter rail if needed. In the interim, a state or a group of rail-trail proponents

could convert the line to a public way.

The first rail-banking effort failed. So in 1983 the National Trail System Act was amended to promote the preservation of abandoned railroad rights of way. The Act authorizes private or public entities to purchase inactive or unused rail lines from railroad companies for conversion to public recreational use. The railroad retains the option to repurchase the trail and reinstall tracks should rail operations once again become necessary.

Then came the idea of funding conversion of abandoned rail lines for bicycles, motorcycles, and snowmobiles. In 1992 Congress dedicated some of the federal-highway funds available to the states and other money to rail trails. Primary sources of the money, the 1991 Intermodal Surface Transportation and Efficiency Act (ISTEA) and its successor, the Transportation Equity Act, have yielded over $2 billion in support of rail trails and related things.[6] That funding, in turn, spawned lobbying organizations like the Rails-to-Trails Conservancy, which assists communities in securing federal money and in planning and constructing bicycle rail trails.

The Conservancy dismisses opposing landowners as "abutters" or "adjacents." But in many cases that is inaccurate because the railroad easements sometimes run *under* houses. In Rowley's case, it runs under a corner of her home. Two of her neighbors are having trouble refinancing their homes because of the easements.

At times a rail trail has been proposed that starts and ends on land owned by a town, a state, or willing private landowners, but crosses property whose owners object. Anyone knowledgeable about project planning would grade such a proposal a dismal failure, but not the Conservancy. Instead, it initiates campaigns touting the benefits of public bike paths (safety and public health) and distributes booklets such as "Rail-trails and Safe Communities." Taxpayer money is then used to clear and pave the beginning and the end of the trail, at which point the landowners in the middle are vilified as "snags," "holdouts," or worse. In 1998, when the people of Weston, Massachusetts, overwhelmingly voted against a rail trail through their town, although it had been approved by towns on either side, the *Boston Globe*'s Derrick Jackson called the residents "coots," "privileged," and "paranoid."

Manual of Advice

The Conservancy publishes a manual of advice for effective rail-trail advocacy, including tips on coalition-building, fundraising, dealing with the opposition, media relations, and pressuring for public acquisition. There's even a section on choosing the right name for the proposed rail trail. ("Bluebird Trail" is a good name, says the Conservancy; "Eminent Domain Trail" presumably is not).

Perhaps the most vocal opponent of the rail trails and the Conservancy's tactics is Richard Welsh of Washington state, founder of the National Association of Reversionary Property Owners (NARPO). His website tracks landowner court cases and monitors the many crimes that occur on rail trails. Its continuing account of trail rapes and murders was used in the Weston campaign.[7] The Conservancy's response is to downplay the crimes.

A bike trail is a good thing, but not at the price of landowners' rights. Conservancy supporters should put themselves in those people's shoes from time to time. □

1. See www.railtrails.org/.

2. Testimony of Keith Laughlin before the Subcommittee on Highways and Transit of the House Committee on Transportation and Infrastructure, June 25, 2002; www.house.gov/transportation/highway/07-25-02/laughlin.html.

3. Statement of Assistant Attorney General Thomas L. Sansonetti before the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Commercial And Administrative Law, "Litigation and Its Effect on the Rails-To-Trails Program," June 20, 2002; www.house.gov/judiciary/sansonetti062002.htm.

4. Testimony of Nels Ackerson regarding Surface Transportation Board Re-Authorization: Inter-Carrier Transactions, Construction & Abandonments before the House Subcommittee on Railroads Committee on Transportation and Infrastructure, May 6, 1998; www.ackersonlaw.com/oral.html.

5. Gregg H. Hirakawa, "Preserving Transportation Corridors for the Future: Another Look at Railroad Deeds in Washington State," *Seattle University Law Review*, Fall 2001, p. 481.

6. See "Transportation Equity Act for the 21st Century," Rails-to-Trails Conservancy, www.railtrails.org/whatwedo/policy/tea21.asp.

7. See http://home.earthlink.net/~dick156/.