exists that the work in question was, in fact, incidental to the construction. As such, defendant has not shown that it is clearly entitled to relief in the form of summary judgment.

We must deny its motion for summary judgment.

ORDER OF COURT

NOW, October 8, 1987, defendant's motion for summary judgment is denied.

Exceptions are granted to the defendant.

BETHLEHEM STEEL CORPORATION v. PENN CENTRAL CORPORATION, C.P.
Franklin County Branch, No. A.D. 1985 - 310

Railroads - Determinable Base Fee - Abandonment

1. Where a railroad holds a determinable base fee over which its tracts previously existed, upon abandonment of the property, the land reverts to the owner of the fee.

2. Mere non-use of a right of way does not constitute an abandonment.

3. Total cessation of use for railroad purposes does constitute abandonment.

4. Where a railroad gives notice of intent to abandon under the Regional Rail Reorganization Act and sells a portion of its right of way are evidence of an intent to abandon.

J. McDowell Sharpe, Esquire, *Counsel for the Plaintiff*
James H. Stewart, Jr., Esquire, *Counsel for the Defendant*

KELLER, P.J., August 27, 1987:

On December 6, 1985, plaintiff, Bethlehem Steel Corporation, filed a complaint in action to quiet title. The land at issue is a 14.12 acre strip which is 60 feet wide and runs for a distance of 1.82 miles. The strip of land runs across and is abutted on both sides by eight contiguous tracts of land owned in fee simple by the plaintiff corporation. The land in question is located in Peters Township, Franklin County, Pennsylvania.

On January 10, 1986, defendant, Penn Central Corporation,

BAR NEWS ITEM AND EDITORIAL

At meeting of the Board of Directors of Franklin County Legal Journal, on January 21, 1988, the Board received, considered and, with regret, accepted the resignation of Philip S. Cosentino, Esquire, as a member of the Board. Phil served us well and faithfully, for a number of years, both in that capacity, and in the office of Secretary of the Corporation. We shall miss Phil's congenial presence at our Board meetings, but we realize that all of us, sooner or later, find it necessary to move on, to other ventures and service activities, in our profession. We certainly thank Phil, for his years of help to us, and we wish him well, in the future.

MANAGING EDITOR, on
behalf of the Editors
and Staff

filed an answer with new matter in which it contended that the defendant is in possession of the right-of-way which is a visible easement upon the land and in constructive possession of the same right-of-way.[1] Defendant further alleged in its answer that it has not abandoned the railroad easement as a matter of law, and, therefore, there exists no basis for a reversion of the title to the plaintiff.

On January 27, 1986, plaintiff filed a reply to new matter.

The parties submitted pre-trial memoranda and a pre-trial conference was held on April 18, 1986. A pre-trial order was entered on May 6, 1986, in which it was ordered that the matter be tried by a judge without jury during the period between July 7, and July 25, 1986.

Defendant filed a motion for leave to amend answer on May 7, 1986. The motion was returned to the defendant due to a procedural deficiency and it was refiled on May 23, 1986. On May 27, 1986, defendant's motion for leave to amend answer was granted. Also on May 27, 1986, plaintiff filed a response to motion for leave to amend answer which did not reach the court in time and was, therefore, given no consideration.

On June 3, 1986, defendant filed an amended answer in the form of a counterclaim alleging that plaintiff had erected a fence enclosing the right-of-way. Defendant contended that the fencing of the right-of-way constituted a continuing trespass upon defendant's rights in the right-of-way, to the damage and injury of defendant. Defendant sought a reasonable rental value for the period of encroachment, along with an order terminating the continued trespass and directing the removal of the fence.

On June 23, 1986, plaintiff filed a reply to counterclaim with new matter denying that the plaintiff erected the fence and requesting a dismissal of the counterclaim.

[1] Pursuant to deed of Franklin County, located in Deed Book L, Volume 75, at Page 553, which incorporates by reference, Order No. 3708 entered August 17, 1978 in the Reorganization proceedings under Section 77 of the Bankruptcy Act, in the Eastern District of Pennsylvania at Docket No. 70-347 and pursuant to the Regional Rail Reorganization Act of 1973, as amended 45 USC 701, et seq., said deed being from the Trustees of Penn Central Transportation Company to defendant.

On July 2, 1986, an order of court was entered rescinding the pre-trial order entered May 6, 1986, to the extent that it is ordered this matter set down for trial between July 7, 1986, and July 25, 1986, and continued the matter until the next trial term. Both parties were required to participate in a new pre-trial conference.

On July 23, 1986, defendant filed an answer to new matter in plaintiff's reply to counterclaim. On August 20, 1986, defendant filed an addendum to its pre-trial and supplemental pre-trial memoranda and withdrew its counterclaims.

On August 25, 1986, the second pre-trial conference was held and on September 10, 1986, the second pre-trial conference order was entered which ordered the case to be tried non-jury and set the trial date for October 28, 1986.

On October 28, 1986, the parties filed a stipulation of facts. It was further agreed by the parties and the court that the matter would be disposed of by limiting the court's consideration to the stipulation of facts, the submitted photographs, the deposition and affadavit of Mr. Joseph. J. Supon (defendant corporation's Director of Real Estate), and the pleadings to the extent of any admissions contained therein.

The parties have submitted memorandum of law, and plaintiff has submitted a reply memorandum.

The court has considered the relevant documents, and the matter is now ripe for disposition.

FINDINGS OF FACT

The parties have stipulated to the following facts:

1. The real property interest involved in this proceeding arose out of the laying out of the Southern Pennsylvania Iron and Railroad Company in 1870 and a condemnation proceeding or release taken in lieu thereof, in the exercise of its right of eminent domain under the procedures set forth in the Act of February 19, 1849, P.L. 79, 15 P.S. 4601 et seq.

2. The Penn Central Corporation is the successor in interest of the rights of Southern Pennsylvania Iron and Railroad Company having acquired the same before its reorganization in bankruptcy while an operating railroad and its interest in the same as confirmed by the deed from the trustees of Penn Central Transportation

Company, recorded in the Office of the Recorder of Deeds in and for Franklin County in Deed Book No. 775, at page 553.

3. Bethlehem Steel Corporation is the owner in fee of eight continguous tracts of land in Peters Township, Franklin County Pennsylvania, as successor in interest to Bethlehem Limestone Company, record title holder, through or along which said right-of-way was laid out.

4. The said right-of-way is 60 feet in width and consists of approximately 14.2 acres of land of which 3.7 acres were taking in condemnation proceedings to No. 13 Term 1870 recorded in the Office of the Prothonotary of Franklin County, Pennsylvania, in Miscellaneous Book B, page 116, as lands of Abraham Keefer.

5. The interest, if any, in lands held by the defendant, The Penn Central Corporation, under its releases, all on the same form, is not contended by the defendant to differ from the interest acquired by condemnation, unless the express provision in the release with respect to non-user by the defendant makes its interest differ from that acquired in eminent domain, in which event defendant claims the benefit thereof.

6. The right-of-way in question was operated as a railroad by the trustees of Penn Central Transportation Company, until January 1, 1976, and it was thereafter operated as a railroad line, in freight service only, by Consolidated Rail Corporation under a subsidy from the Commonwealth of Pennsylvania to whom said line was leased until the spring of 1981.

7. Pursuant to the provisions of the Regional Rail Reorganization Act, 45 U.S.C. 447(b)(2) (Section 304(b)(2) of the Act), a notice was given to persons required under said Act, and rail service was terminated thereon and no person entitled under said Act to do so has made any effort to acquire said right-of-way for any purpose.

8. The said right-of-way was part of the railroad branch between Mercersburg and Marion, sometimes known as the Mercersburg Secondary Tract, being a light density freight line, and being described as U.V.A. line No. 206 in the Final System Plan. The branch connects at Marion with the Cumberland Valley line of Conrail, which continues to be an operating railroad. There is no connection with any active rail line at any other place on the Mercersburg Secondary Track.

9. The said branch was not classified by the Final System Plan as required for the Fossil Fuel Rail Bank, for transfer to a profitable railroad or specifically designated for any purpose by the Final System Plan.

10. Defendant has executed quit-claim deeds to various underlying land owners for portions of the right-of-way. Two conveyances of the branch have been made between lands of plaintiff and Marion. One is a conveyance to Denny G. and Mark D. Strock, who own a caboose and purchased 420 linear feet of the right-of-way. The second is a conveyance to Nibble with Gibbles, Inc., at the Marion end of the branch and its connection with the Cumberland Valley railroad line, owned and operated by Conrail, which was purchased to connect purchaser's plant to Conrail. Defendants hold agreements subsequently executed by said persons for continued use of the branch over the rights-of-way they acquired, should defendant find persons willing to operate the right-of-way for railroad purposes.

11. Defendant offered to sell its interest in the right-of-way over lands of plaintiff to plaintiff, as appears from the correspondence. Paul G. Kerr, the Marketing Representative in Special Sales for The Penn Central Corporation has duties relating to contracts, but is not directly involved in the sale of the right-of-way. Sales are under the direct supervision of Joseph J. Supon, Director of Real Estate.

12. The right-of-way on this branch has been included as a right-of-way for sale in its brochure of corridors for sale, used to market properties held by defendant to persons entitled to use a corridor, some of whom may be entitled to use the same for non-rail purposes.

13. The righty-of-way in question is visible on the ground, the road retains its grade, the bridge substructures reamian in place and the ballast remains thereon though there is no regular periodic maintenance of the right-of-way.

14. The tracks and ties, except as aforesaid, were removed by the defendant under a contract with Pohl Co. from which defendant received a salvage payment of $240,000, said track having been removed about 1982.

15. There is no evidence of the exercise of the rights of possession of this right-of-way by either plaintiff or defendant, although defendant contends that it inspects the same not less frequently than annually, and one of plaintiff's tenants recently has erected a three-strand barbed wire fence across the easternmost section of the right-of-way. The fence remains in place with defendant's permission.

16. Defendant has permitted the right-of-way to become overgrown with brush, though most of the same remains passable. It is not tillable because of the ballast and the trees, shrubs and bushes which flank the roadbed.

17. The right-of-way is not assessed for real estate tax purposes.

18. The right-of-way, together with all other real estate interests transferred to defendant by the trustees of Penn Central Transportation Company, is carried on the books of the Penn Central Corporation at the values established in the reorganization proceedings as the value of each of the properties held by the trustees for consideration in establishing The Final System Plan and the transfer of lands to the Conrail or other profitable railroads. The determination that the defendant is without rights in this proceeding will effect a substantial amount of right-of-way similarly held. The asset value so carried presently is in the amount of $50,000,000, including all remaining real estate interests so transferred.

19. The center line description of the right-of-way prepared by plaintiffs is agreed to as a sufficient description of the lands in question for the purpose of this proceeding.

20. The deposition of Joseph J. Supon and his affidavit are agreed to as to the testimony he would give, if called at the trial in this proceeding.

21. This stipulation of facts is agreed to subject to argument from both parties as to the relevance or legal weight entitled to be given any fact.

DISCUSSION

Since the parties are in agreement as to the nature of the interests involved and as to the fact that the landowners hold a reversionary interest in the property which would vest in the event the railroad abandons the property, we are faced only with the question of whether or not the intentions and acts of the defendant, Penn Central Corporation, constitute abandonment. To constitute abandonment, there must be an intention to abandon together with "external acts" by which that intention has been carried into effect. *Lacy v. East Broad Top R.R. and Coal Co.,* 168 Pa. Super. 351, 358, 77 A.2d 706, 710 (1951). The estate of a railroad does not terminate until there has been an actual abandonment. *Id.* at 358, 77 A.2d at 710. Mere non-user of a right-of-way does not constitute and abandonment. *Id.* at 358, 77 A.2d at 710. When the strip of land ceased to be used for the purpose acquired, the rights of the railroad ceased and reverted to the owner of the fee. *Brookbank v. Benedum-Trees Oil Co.,* 389 Pa. 151, 167, 131 A.2d 103, 112 (1957).

Thus we may conclude that, although mere non-user does not

constitute an abandonment, a total cessation of use for railroad purposes would constitute an abandonment. We now turn to the first aspect of the issue to determine whether plaintiff, Bethlehem Steel Corporation, has offered sufficient evidence of an intention on the part of Penn Central to abandon the property.

Plaintiff first points to the notice under Section 304(b) of the Railroad Reorganization Act of 1973, 45 U.S.C. 744(b) filed by Penn Central as evidence of the railroad's intention to abandon the property. Penn Central responds that the notice was given merely so that it would be relieved of the regulatory requirement that it retain the strip for use in public service. Penn Central argues further that it had no intention of abandoning its property rights.

Even if Penn Central's "relief from regulatory requirement" argument was valid, it is a fact that once the notice was given to relieve Penn Central from regulation, (and the property moved of the public domain), that any disposition of the property subsequent to the giving of the notice would be a purely private disposition and contrary to the nature of the base fee.

Penn Central contends that once the notice was given it was open to any use that can properly be made of its real property rights. The only proper use would be a railroad use, which is the condition of the base fee. More specifically, Penn Central claims that it holds its rights for future railroad use, if any such use should ever arise. Such an argument has a major fault. The owner of a base fee could forever contend that it is being held for future use and thus render the fee simple owner's reversion rights illusory. That is obviously not the intent behind the establishment of such base fees. As was previously noted, since the interest is only a base fee, to prove abandonment Bethlehem Steel only needs to show actual diversion of use from railroad use. If it were held in fee simple, Bethlehem Steel would have had to show a total abandonment of the real estate.

A mere cursory reading of the notice shows a clear intent on the part of Penn Central. The notice reads as follows:

> "The Penn Central Corporation hereby gives notice, pursuant to Section 304(b) of the Regional Rail Reorganization Act of 1973, as amended, of its intention, effective May 1, 1981 to abandon a portion of the Mercersburg Secondary Tract between Marion (M.P. 59.06) and Mercersburg (M.P. 72.63) in the Commonwealth of Pennsylvania.

"In the Final System Plan adopted under the terms of the 1973 statute, as amended, the above line segment was not designated for continuted operation by Consolidated Rail Corporation or any other carrier, but was included by the Commonwealth of Pennsylvania in its rail freight service subsidy program. The Pennsylvania Department of Transportation has now advised that its lease of the line and provision of subsidized rail service will be terminated on March 31, 1981. The rail line will therefore be officially abandoned as noted above."

We are hard pressed to find stronger evidence of an intent to abandon property than when a party states in an official notice such phrases as: "The Penn Central Corporation hereby gives notice . . . of its intention . . . to abandon . . . ", and "The rail line will therefore be officially abandoned . . . "

As was previously stated, Penn Central's argument that this notice was given merely to relieve it from regulatory requirements is of no help to Penn Central's position. Taken together with other facts surrounding this case, once the notice was given and once certain external acts were performed, the property was abandoned for railroad purposes and reverted to Bethlehem Steel.

In an attempt to bolster its position, Bethlehem Steel maintains that the true intention of Penn Central is evidenced by its efforts to market this particular parcel of land; by its attempt to sell the property to Bethlehem Steel as a non-rail transportation corridor; and by actual sales to private parties for private purposes. Our close scrutiny of the totality-of-the-circumstances leads us to the necessary conclusion that plaintiff's position is correct. We are unable to envision how Penn Central can rationally claim that it has never intended to abandon the property for railroad purposes when it has made a serious effort to market the property as a non-rail transportation corridor. Indeed, defendant's apparently serious offer to sell the real estate here in issue to the plaintiff belies defendant's contention.

Finally, and perhaps most detrimental to Penn Central's position, is the fact ath it has sold portions of the right-of-way on both ends of the strip here in question to private parties. Those sales rendered this strip useless as a railroad right-of-way. In an attempt to better its litigation position, Penn Central belatedly entered into contracts with both private parties whereby Penn Central could re-obtain railroad rights over the property. However, these reacquired rights with all other facts and circumstances including

the earlier sales continues to lead to the inescapable conclusion that Penn Central intended to abandon the property for railroad purposes.

The second part of the issue of abandonment we must determine is whether the plaintiff has sustained the burden of proving by a preponderance of the evidence the existence of external acts that lead to the conclusion that the defendant did abandon its base fee interest, i.e. implement its intention by action. In the case at bar the facts established that evidence of abandonment are:

(1) a notice of abandonment was issued;
(2) all railroad tracks were removed;
(3) all railroad ties were removed;
(4) there has been no maintenance of the strip;
(5) the strip has been a part of serious marketing efforts;
(6) parts of the strip have been sold;
(7) there exists a practical impossibility as defined by the court in *Spring Brook Railway Company v. Spring Brook Water Supply Company,* 3 Lack. Leg. News 90, 97 (1897) of ever using the property for railroad purposes.

In our judgment, these facts coupled with the defendant's established intent are conclusive of abandonment.

In our opinion the flaw in defendant's contention is that the thrust of its entire argument misapprehends the nature of its interest. Penn Central concedes that it holds only a determinable base fee, but it then seeks to treat its interest as a fee simple. Throughout its argument, defendant has attempted to enlarge the nature of its interest by referring to it as a grant, as opposed to a mere base fee. *See, Brookbank,* 389 Pa. at 167, 131 A.2d at 112. The law governing fee simple interests and base fee interests and the rights, privileges, prerogatives and responsibilities of those interests differ sharply.

We conclude that Bethlehem Steel has offered more than sufficient evidence of intent and external acts on the part of Penn Central which leads to our decision that the property in question has been abandoned for railroad use by Penn Cetral and it, therefore, reverts to Bethlehem Steel.

ORDER OF COURT

NOW, this 27th day of August, 1987, the court having concluded that the defendant Penn Central Corporation abandoned its base fee interest in that certain "Railroad Strip" 1.82 miles

long and 60 feet wide extending through lands of the plaintiff Bethlehem Steel Corporation more fully bounded and described in deeds recorded in:

(A) Franklin County Deed Book Volume 508, Page 369, dated July 1, 1954:
(B) Franklin County Deed Book Volume 508, page 409, Dated January 3, 1957;
(C) Franklin County Deed Book Volume 508, page 372, dated July 15, 1954;
(D) Franklin County Deed Book Volume 508, page 382, dated March 31, 1954;
(E) Franklin County Deed Book Volume 509, Page 609, dated January 10, 1959;
(F) Franklin County Deed Book Volume 510, page 44, dated January 26, 1959;
(G) Franklin County Deed Book Volume 508, page 352, dated December 17, 1953;
(H) Franklin County Deed Book Volume 508, page 406, dated April 1, 1957.

NOW, THEREFORE, final judgment in favor of the plaintiff Bethlehem Steel Corporation is herewith entered and the defendant Penn Central Corporation is barred from asserting any right, lien, title or interest in the said lands of the plaintiff inconsistent with its fee simple title.

Costs to be paid by the defendant.

KEGERREIS VS. EASTON, C.P. Franklin County Branch, No. A.D. 1987-216

Appeal - District Justice - Failure to Give Notice

1. Where defendant alleges a meritorious defense, plaintiff demonstrates no prejudice and the circumstances surrounding non-compliance with procedural rules are explained, defendant may proceed with his appeal.

J. Dennis Guyer, Esquire, Attorney for Defendant
John W. Frey, Esquire, Attorney for Plaintiff

OPINION AND ORDER

KAYE, J., November 4, 1987: