



**EMINENT DOMAIN, RAILROADS, AND LEGISLATIVE POLICY:
THE SOUTH DAKOTA EXPERIENCE**

The Common Law and Eminent Domain

Although the term, eminent domain, was coined by the Father of International Law, Hugo Grotius, in his 1625 masterpiece, *De Jure Belli Et Pacis*, the concept of eminent domain is older still—perhaps as old as the coexistence of private property and centralized government. Certainly the Greeks and Romans exercised it; but, in an age when the rights of the state dwarfed the rights of the individual, the concept attracted little legal notice. The collapse of the Roman Empire inaugurated the Age of Feudalism and with it a dynamic reassessment of the role of private property and its relationship to vassalage.

Consequently, while it can be argued that the concept of eminent domain is as old as civilization, most Anglo-American scholars prefer to think of its common law development as dating from that terminal date in the history of western civilization, 1066 and the Norman Conquest. Certainly, William the Conqueror maintained that all of England was his by right of arms to dispose of as he alone saw fit and that the land titles of the Anglo-Saxon nobility had been extinguished on the bloody field of Hastings.

William did more than merely replace English overlords with his Norman vassals. He altered not only the ownership but the use of lands which had been agricultural from times immemorial. He evicted peasants and tenants from their farms and pastures and built a network of castles, strongholds, and marketplaces. Most notoriously, in 1079, he confiscated a rich farming region in Hampshire near the royal capital of Winchester and had it replanted to forest to serve as a royal hunting preserve. The outrage of the disposed peasants knew no bounds, and, twenty-one years later, the Norman king was shot in the back by an English arrow while hunting deer in the "New Forest."

From that time forward, landowners have continually felt threatened by the doctrine of eminent domain and have resented its imposition. Moreover, it has often been confused in the popular mind with other detested forms of taking, such as adverse possession, nuisance abatement, fines and forfeitures for criminal acts, and loss of property for nonpayment of taxes. Although each of these is clearly distinguishable from eminent domain, to the property owner they represent governmental repression.

The Constitution specifically refers to the concept of eminent domain in the

Fifth Amendment where it is stated that "nor shall private property be taken for public use without just compensation." Moreover, Article I, section 8, recognizes that the federal government, with the consent of the states, may acquire and maintain private property for needful federal purposes like forts, arsenals, and dockyards. Of course, in the early years of the American Republic, the government seldom felt compelled to condemn private property for public purposes because it already owned vast tracts of land which could be used for military establishments and other federal purposes. Moreover, all the state constitutions recognized the sovereign right of eminent domain. The states did not own significant amounts of public land, but most of their public needs could be met by private purchase.

The advance of technology and the necessity of building a transportation and communications infrastructure dramatically altered the doctrine of eminent domain in post-Civil War America. It was the age of the railroad, and the public good required that legal processes be reformulated to accommodate rail services. The states universally made limited grants of their sovereign authority to rail lines to permit the exercise of eminent domain if private purchase failed. Even though statutes required just compensation and judicial oversight, landowner resentment escalated. Everyone appreciated the economic potential of rail transport, but no one enjoyed being compelled to sell his property for the general weal, especially when the compeller was not the government but a private corporation operating at a profit.

With the virtual completion of the American rail system early in this

century, the use of eminent domain by railroads quickly became a forgotten issue. Railroads were no longer being built, but new public utilities--telephone, electrical, gas--were being permitted to use the power of eminent domain. This was done, and is still being done, on a wide, but fairly unobtrusive scale. The major focus of eminent domain today revolves around roads and highways, especially those involving interstate or intracity transportation. Such projects, as well as airport construction and waste treatment and storage facilities, continue to be highly controversial; but, public hostility toward the use of eminent domain in these instances tends to be mitigated by the fact that they are clearly governmental services, rather than public utilities.

South Dakota Statehood and Eminent Domain

The state constitution of South Dakota, written in 1885 and ratified in 1889, carried an eminent domain provision that was characteristic of the historical period from which it emanates. Article VI, section 13, provides:

Private property shall not be taken for public use, or damaged, without just compensation, which will be determined according to legal procedure established by the Legislature and according to ¶ 6 of this article. No benefit which may accrue to the owner as the result of an improvement made by any private corporation shall be considered in fixing the compensation for property taken or damaged. The fee of land taken for railroad tracks or other highways shall remain in such

owners, subject to the use for which it is taken.

As the reference to railroad condemnations in the final sentence suggests, South Dakota's constitutional and legislative leaders were struggling with a more fundamental political problem at that time—namely, how to encourage necessary rail development in the new state without exacerbating agricultural animosity toward the railroad companies that enjoyed a virtual monopoly over freight rates.

The Upper Midwest's grain and cattle economy was the most rail-dependent economy in the nation at that time, and South Dakota was far and away the most railroad-poor state in the region. At a time in the 1860s, 1870s, and 1880s, when several transcontinental rail lines were being constructed across Nebraska and the northern half of Dakota Territory, no transcontinental entered what is today South Dakota. All of western South Dakota, except the Black Hills after the 1876 gold rush, were part of the Great Sioux Reservation, which was supposed to be the perpetual home of the powerful Lakota nation just as present day Oklahoma was then called the Indian Territories and was set aside as the permanent home of the Five Civilized Tribes. No transcontinental railroad had any interest in crossing an Indian country which would never be settled or produce marketable crops.

By 1889, when General Crook negotiated the opening of substantial portions of the Great Sioux Reservation to white settlement, the heyday of rail expansion was past. South Dakota would never have a transcontinental artery so critical to agricultural prosperity. Moreover, this made the

development of short line railroads that much more important to the young state even though short lines must charge higher freight rates than more efficient long-haul lines. Prairie farmers were in a whipsaw relationship with the railroads. In the days before motorized trucking, rail was the only cost effective way to move cattle and grain to eastern markets. Communities clamored to lure rail lines to their settlements. Yet, the moment the railroads arrived, farmers began to seethe at the high and uncompetitive freight rates that the rail companies charged—partly to reap big profits, but, in fairness, partly to recoup the tremendous investment costs of constructing feeder lines to small communities.

Agrarian unrest about rates and monopolies was not eased by the public perception that railroads dominated the prairie states politically—a perception that was substantially correct. Railroads had the biggest payrolls and largest capital investments of any industry in the Upper Midwest. They controlled state legislatures with free passes, jobs for friends and relatives, and outright bribes. In the days before the Seventeenth Amendment, the legislatures elected the U.S. senators, and the railroads nominated their own executives and lawyers for the jobs. It was a standing joke that Nebraska had two senators, the president of the Union Pacific and the president of the Burlington.

Although matters never got quite that bad in South Dakota, the Milwaukee Road and the Chicago, Northwestern were powerful lobbies from statehood until the 1920s. The capital fight was essentially a contest between the two rail lines with the Chicago, Northwestern championing Pierre and the Milwaukee

Road insisting on Mitchell. Usually, the two behemoths cooperated to quash freight regulation and corporate restrictions in the Legislature. Both the populist movement of the 1890s and the progressive movement of the Teddy Roosevelt era were primarily crusades against corporate power in general and the railroads and banks in particular. By the time roads and trucks were providing a viable freight alternative to farmers in the 1930s and 1940s, the political prestige of the railroads had sunk to woeful levels from which it has never completely recovered.

Decline of the Rail System

Stagnation accelerated to rapid deterioration when the railroads found themselves at an increasing competitive disadvantage to trucking, which benefited from new roads and cheap fuel in the 1950s and 1960s. By the 1970s, South Dakota railroads were so weak that they were curtailing services and abandoning feeder lines all across the state. In those years, Senator Jack Jackson from Huron, a retired conductor on the Chicago, Northwestern, repeatedly introduced, with little success, a series of bills designed to relieve railroads of small expenses such as the maintenance of certain fences and crossings and the relaxation of certain safety provisions such as requiring trains to pull cabooses. No one in those legislatures expected those bills to result in better rail service, and there was no political support for railroad relief.

By the late 1970s, however, the rail crisis could no longer be ignored. With losses mounting and abandonment of main lines threatened, the Legislature passed two significant bills in 1978 to provide for regional railroad authorities

and to authorize local aid to railroads in return for improved services. By 1980 and 1981, however, it was necessary for the Legislature, at the suggestion of Governor Janklow, to create the South Dakota Rail Authority to preserve the core lines and provide minimal rail service. This constructive state action was effective in preserving the more important segments of the state rail system until the rail companies could reorganize, devise new corporate strategies, refinance, and find new business resources. Soon, coal from Wyoming and wood pulp from the Black Hills were providing enough steady revenue to enable lines to operate a scaled-back system. An investment tax credit was also enacted to encourage railroads to invest their corporate assets in improved physical facilities.

Recent Legislative Developments

Coal unit trains have been a major, if indirect, stimulus for recent legislation before the South Dakota Legislature. Coal train traffic has proven very profitable to the Burlington Northern; and the Dakota, Minnesota and Eastern (DM&E), operating portions of the old Chicago, Northwestern core line, has proposed a major expansion to permit it to participate in the coal traffic. Political opposition to the DM&E expansion first reached the Legislature in 1998 when a group of Fall River County landowners sought to curtail a statute which has granted railroads the right of eminent domain since 1879. Senate Bill 176, sponsored by Senator Valandra, would have restricted the authority of a railroad to exercise eminent domain to just those rail projects which had been previously approved by legislative enactment. The bill died in committee when the Fall River ranchers failed to appear at the committee hearings.

By 1999, however, political opposition to rail expansion and unit train traffic was spreading statewide. Representative Volesky reintroduced the Valandra provisions in the form of HB 1123, but this bill also died in committee. Senate Bill 212, which was introduced by Senator Vitter and would have provided a procedure for granting a permit for railroad construction by decision of the Transportation Commission, was similarly killed in committee.

The focus of the legislative debate then shifted to HB 1106. In its original form, HB 1106, introduced by Representative Wetz, would have repealed or phased out certain rail tax benefits, most notably the investment tax credit (SDCL 10-28-21.1). The bill's proponents were primarily concerned about the Burlington Northern and were critical of that line's substantial tax breaks without, in the opinion of some, any improvement in agricultural freight rates and services. However, if the DM&E's expansion were to materialize, the repeal of the tax credit would also have very serious ramifications for their financial situation.

With both the Burlington Northern and the Dakota, Minnesota, and Eastern vitally concerned with the provisions of HB 1106, and with HB 1123 and SB 212 already dead in committee, HB 1106 also became the legislative vehicle for debate about the use of eminent domain to facilitate rail expansion. Most of the provisions of SB 212 were offered as amendments to HB 1106. The committee hearing process culminated in a confrontation between the Governor and the president of the DM&E. Governor Janklow argued that the public welfare demands broad public input and considered executive action before railroads are allowed to exercise

eminent domain over private property. President Kevin Schieffer opposed any substantial limitation on the railroad's ability to exercise eminent domain as jeopardizing the viability of the expansion project. The critical provision in the bill is embodied in the following amendment to SDCL 49-16A-75:

49-16A-75. A railroad may exercise the right of eminent domain in acquiring right-of-way as provided by statute, but only upon obtaining authority from the Governor or if directed by the Governor, or the commission, based upon a determination by the Governor or the commission that the railroad's exercise of the right of eminent domain would be for a public use consistent with public necessity. The Governor or the commission shall consider the requirements of sections 5, 6, and 7 of this Act when granting or denying an application for authority to use eminent domain. The decision to grant or deny an application shall be made after reasonable notice and opportunity to be heard, pursuant to chapter 1-26.

Any appeal pursuant to chapter 1-26, taken from a decision of the Governor or the commission shall be handled as an expedited appeal by the courts of this state.

With this provision in place as well as many of the permit process provisions from SB 212, HB 1106 passed the Senate 28 to 6, and the House of Representatives concurred by a vote of 54 to 15.

Conclusion

Although it passed by substantial margins in both houses, many of the factions supporting and opposing rail

expansion in South Dakota have expressed dissatisfaction with portions of HB 1106. Opponents of rail development would prefer repealing the right of any railroad to exercise eminent domain. This would constitute a radical and unprecedented legislative policy but would have the effect of ending rail development without specific legislative approval. Others believe that the

provisions of HB 1106 have already effectively killed the proposed DM&E expansion and its attendant economic development. They would restore the provisions of SDCL 49-16A-75 to their previous form. In either case, in the coming session the Legislature is likely to be revisiting these issues which have otherwise lain dormant for a century.

This issue memorandum was written by Reuben D. Bezpaletz, Chief of Research Analysis and Legal Services for the Legislative Research Council. It is designed to supply background information on the subject and is not a policy statement made by the Legislative Research Council.
