IN THE SUPREME COURT

Home of Economy, a North Dakota Corporation,	)	
	)	District Court No. 03-C-01320
Appellant,	)	Supreme Court No. 20070002
	)	
v.	)	
	)	
Burlington Northern Santa Fe Railroad, a National Railroad Corporation,	)	
	)	
Appellee.	)	

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION.

The District Court erroneously determined that Home of Economy [hereinafter "HOE"] failed to prove whether or not the railroad had permitted the crossing to be used (the requirement of hostility could not be established). (Memo Decision, p. 5; App., p. 71). It is uncontested that the remaining requirements for an easement were established; the use of the crossing was open, notorious, continuous, general and uninterrupted for the statutory period of 20 years.

Burlington Northern Santa Fe Railroad's [hereinafter "BNSF"] brief is 42 pages long, touches on several theories, and cites 47 cases, 21 statutes and many other authorities. However, not a single word appears to contradict the assertion by HOE that an easement by prescription or by estoppel was established. The absence of a response compels the conclusion that BNSF finds HOE's logic unassailable.

Before the turn of the last century, the railroad either gave permission for the owner of Lot 2 to cross its right-of-way or it did not give permission. If the railroad gave permission, then the subsequent investment by Cliff Olson and his predecessors in buildings and equipment created an easement by estoppel. If the railroad did not give permission to Olson and his predecessors, then the use of the crossing was hostile and the final requirement for establishing an easement by prescription is satisfied. Whether or not the railroad consented to the crossing is therefore irrelevant. HOE is not required to prove the existence of (or lack of) a conversation that likely occurred well over a century ago. The law does not require impossibilities, the law does not require idle acts, and it disregards trifles. § 31-11-05(22), (23), and (24), N.D.C.C. Because a valid easement

exists regardless of whether or not permission was obtained from the railroad, the question is moot.

Regardless who has the burden of proof (BNSF must have it since all other requirements for an easement are present), the presence of an easement cannot be doubted. The easement existed before 1925 and continued until the railroad closed the crossing in 2003. The easement still exists because HOE has not abandoned the easement; abandonment for 20 years is necessary for the easement to disappear. §47-05-12(4), N.D.C.C.

II. MISCELLANEOUS RESPONSES TO BNSF'S BRIEF.

A. Whether HOE provided upkeep for the easement is not relevant.

On page 2 of its brief, BNSF complains that HOE has not shown any willingness to pay for the upkeep of the easement. Although payment or non-payment of the upkeep is not relevant, Cliff Olson did maintain the west side of the easement for all the years he owned the property. (App. pp. 38, 39). However, it is not relevant to discuss the cost of maintenance on an easement that has been in place for at least 80 years.

B. Legality of the stop sign erected by BNSF is not relevant.

On page 3 of its brief, BNSF raises an issue that was not addressed in the court below. It complains that the stop sign that it erected was illegal. The stop sign went up after HOE told BNSF's yardmaster that it could not close the crossing in 1994. Regardless, the existence of an illegal or legal stop sign does not alter an easement created 100 years before the sign was erected.

The railroad's sudden concern for safety does not alter the existence of an easement. (BNSF Brief, p. 3). There has never been an accident at this crossing. The

issue of safety is a red herring. There are at least a dozen crossings on this spur line, only one of which has the arms that close the road while the trains pass. Indeed, there is a paved bike path that is continuously open within 30 feet of the crossing in question.

BNSF claims that because many trains cross over the easement each day that as a matter of law there is a substantial danger to motor vehicles. (BNSF Brief, p. 27). Once again BNSF seems to be raising the red herring issue of safety, and we doubt that the danger can ascend to a matter of law when there are a dozen other unguarded crossings on this spur, including a bike path within 30 feet, and especially when there has never been an accident at the crossing.

BNSF mentions the train-auto collision case from rural Dickinson that resulted in a verdict of $10 million. Within the practicing Bar, the case is remembered as the one where counsel for the railroad waived final argument to the jury.

C. Formal "naming" of the easement is not required.

BNSF claims, for the first time (BNSF Brief, p. 4), that there can be no easement because the crossing does not possess a number or name like streets, avenues and highways. If it pleases the railroad, we will name the crossing the "Burlington Street."

D. Because an easement already exists, HOE is not seeking to establish an easement.

On page 5 of its brief, BNSF attempts to characterize the theory of the case as one where HOE seeks to establish an easement. The same error appears elsewhere it its brief, and HOE is at a loss to understand how BNSF can continually misunderstand the case. From the time of the complaint, HOE has maintained that an easement came into existence decades ago and remains in place to this date.

BNSF complains that HOE has not offered to pay BNSF for the use of the property, address risk, or indemnify BNSF for its negligence if a train hit a car or pedestrian. (BNSF Brief. p. 6). This contention was not raised and certainly is not one of the conditions for an easement by prescription.

E. Case law allows an easement over railroad property.

BNSF complains (BNSF Brief, p. 6) that HOE failed to cite a case that permits an easement across a railroads tracks. In Rayton v. Pollard, 270 Fed. 5 (1920), the issue was whether the public could obtain an easement across railroad right-of-way. The question was answered in the affirmative. In Rayton, the court held:

> Plaintiff in error also contends that a highway cannot be established by prescription over the right-of-way of the railway company because the right-of-way is already devoted to a public use. In support of this proposition is cited the case of City of Albuquerque v. Garcia, 17 N.M. 445, 130 Pac. 118, denying the power of condemnation to a city for street purposes of a community acequia in actual use, and the case of Northern Pacific Railway Co. v. Townsend, 190 U.S. 267, 23 Sup.Ct. 671, 47 L.Ed. 1044, holding that an individual could not for private purposes acquire any portion of the right-of-way of the Northern Pacific Railway Company. But the question here involved is not the power to acquire by condemnation against the railway company's consent, but the power to acquire by prescriptive use, which presumes the consent of the owner; neither is it determined by the decision in the Townsend Case, which interpreted the acts of Congress granting a right-of-way to the Northern Pacific Railway Company as prohibiting its alienation, for the right-of-way of the Santa Fe Railway Company is not shown to have been granted by Congress, but is shown to have been acquired by deed from the Maxwell Land Grant Company, and no restriction on alienation is shown to exist. The general and approved rule is that title may be gained by adverse possession to portions of a railway company's right-of-way), [citing cases] and that highways may be established by prescriptive use over or along the right-of-way of a railway company (Gay v. Boston & A.R. Co., 141 Mass. 407, 6 N.E. 236; Hall v.

> Boston & M.R.R., 211 Mass. 174, 97 N.E. 914; Pittsburgh, C., C. & St. L. Ry. Co. v. Town of Crow Point, 150 Ind. 536, 50 N.E. 741; Blumenthal v. State, 21 Ind. App. 665, 51 N.E. 496; Gage v. Township of Pittsfield, 120 Mich. 436, 79 N.W. 687; Village of Peotone v. Illinois Central R. Co., 224 Ill. 101, 79 N.E. 678; Gulf, C. & S.F. Ry. Co. v. Bluitt, (Tex. Civ. App.) 204 S.W. 441; Gulf, C. & S.F. Ry. Co. v. Bryant, (Tex. Civ. App.) 204 S.W. 443).

BNSF asserts (BNSF Brief, p. 7) that railroad rights-of-way are unique and as a matter of law easements cannot be obtained over them under any circumstances. If this were true, BNSF could close down every private and public crossing in North Dakota unless it has deeded a right-of-way across the tracks. To bolster that argument it cites three cases, Barnard v. Wabash R. Co., 208 F.2d 489 (8th Cir. 1953); Midland Valley R. Co. v. Jarvis, 29 F.2d 539, 540 (8th Cir. 1928) and Hanson Indus. Inc. v. County of Spokane, 58 P.3d 910, 914 (Wash. Ct. App. 2002).

None of the cases cited by BNSF are persuasive. Barnard involved an alleged false arrest by a railroad security guard on railroad property and had nothing to do with an easement by estoppel or prescription. Midland Valley upheld the railroad's right to refuse Jarvis' plan to build a structure on the railroads property without its permission, hardly a case declaring railroad property unique. The Hanson Industries decision determined that a deed of land to a railroad for right-of-way conveyed not a fee, but only an easement. In Hanson Industries, the court also held that a railroad right-of-way did not give the railroad exclusive possession of the property, but merely created a presumption of exclusiveness. Presumptions can be and often are rebutted.

In HOE's opening brief, it stated that it had no quarrel with Nowling v. BNSF Ry., 2002 ND 104 ¶¶ 7, 11 & 14, 646 N.W. 719, since there is a vast difference between an easement by prescription and obtaining fee title by adverse possession. We cited

authorities for that rule, and while BNSF raises Nowling (BNSF Brief, p. 7), it did not respond to the points in HOE's brief on this issue.

Yet another court has had the opportunity to distinguish adverse possession from an easement by prescription. In Eaton v. Town of Wells, 2000 Me. 176, 760 A.2d 232 (Me. 2000), the court held:

> Finally, the Eatons argue that the court's finding that a claim of right for purposes of prescriptive easement existed is inconsistent with its other finding that no claim of right for purposes of adverse possession existed. The Eatons fail to recognize, however, that the claims are distinct. [A]dverse possession concerns itself chiefly with the acquisition of a present possessory estate, that is, fee simple absolute ··· Prescription, on the other hand, concerns itself wholly with the acquisition of *rights in* the land of another, such as easements. POWELL ON REAL PROPERTY § 91.01[3] (2000).

For a further excursion (BNSF Brief, p. 9) into the irrelevant, BNSF relies on Lincoln v. Great Northern Ry. Co., 144 N.W. 713 (N.D. 1914). A bridge was raised to permit water and ice to flow freely. The railroad tracks crossed over the bridge. The railroad then raised their tracks leading up to the bridge, including tracks that were crossed by a private easement about 1,000 feet away. The landowner who owned the land on each side of the right-of-way complained and sought a mandatory injunction to lower the tracks to their previous height. There was no challenge to the private crossing, no claim that railroad right-of-way is unique, or that a railroad can do whatever it pleases, as is the case here. This Court sided with the railroad in a real no-brainer.

BNSF's reliance on § 49-11-17, N.D.C.C., (BNSF Brief, p. 10) is puzzling. That section requires the railroad to establish a crossing if the adjoining landowner owns land

on both sides of the right-of-way. How does this jibe with BNSF's belief that there can be no private crossings and it can close a crossing with impunity?

F. BNSF's maintenance of the easement does not terminate the easement.

Next, BNSF complains (BNSF Brief, p. 13) that there can be no easement because it maintained the crossing. This is another new issue raised by BNSF, and as irrelevant as the others. What do you suppose BNSF would have done if Cliff Olson tried to tamper with the planks it laid between the rails? As mentioned earlier, Olson and HOE maintained the west side of the road. Indeed, Olson installed a culvert to drain water from the crossing.

G. There is no requirement that the easement be dedicated as a public road.

Yet another new claim is made on page 14 to the effect that the crossing was never a state or federal highway, or a county or township road, or a city street, nor was it dedicated or established as a highway. Of course this makes no difference. Perhaps this is just another way of complaining that no one ever got around to naming the crossing.

H. HOE is not required to prove the railroad agreed to the crossing.

BNSF alleges (BNSF Brief, pp. 16, 17) that proof of some sort of communication between BNSF and Olson's predecessors where the railroad agreed to the crossing is a necessary ingredient of an easement by estoppel. HOE need not perform an idle act, since if BNSF did not give permission, then we have proven hostility. However, the cases do not support BNSF's position in any event. Indeed, the case law it cites is all we need to dispel the Court of that conclusion.

In Lewis W. Epstein Family Partnership v. K-Mart Corp., 13 F.3d 762 (3d Cir. 1974), the Third Circuit held:

In Pennsylvania, the elements of an estoppel are:

> 1) misleading words, conduct, or silence by the party against whom the estoppel is asserted; 2) unambiguous proof of reasonable reliance upon the misrepresentation by the party asserting the estoppel; and 3) the lack of a duty to inquire on the party asserting the estoppel. (Emphasis supplied).

In a case cited by BNSF, Exxon Corp. v. Schutzmaier, 537 S.W. 2d 282 (Tex. Civ. App. 1976), the court held:

> In general, one who attempts to create an easement by estoppel must show that (1) a representation must have been communicated to the promisee, (2) that it must have been believed, and (3) that there must have been reliance upon such communication. Doss v. Blackstock, 466 S.W.2d 59, 61 (Tex. Civ. App.-Austin 1971, writ ref'd n.r.e.). But the doctrine of easement by estoppel (or estoppel In pais as sometimes referred to) has not been applied with the same strictness and conclusiveness as easements by implication. As has been said by the Supreme Court, 'The exact nature and extent of the doctrine of estoppel in pais have not been clearly defined.' Drye v. Eagle Rock Ranch, Inc., supra, 364 S.W.2d at 209. In certain situations, it has thus been suggested that the cases should more properly be based upon a construction of the surrounding circumstances. Drye v. Eagle Rock Ranch, Inc., supra, at 210, citing 3 Tiffany on Real Property 315, s 800 (3d Ed. 1939)). (Emphasis supplied).

There are many ways to communicate or send a message. Certainly the railroad was aware of the crossing; it claims (BNSF Brief, p. 27) that 40 to 70 trains a day pass over the crossing. Just acquiescing in the existence of the crossing and, indeed, maintaining the crossing and installing planks between the rails sends a clear message to Olson and his predecessors that an easement exists. And whether the railroad sent a message, by silence or otherwise, to HOE is not the issue as BNSF claims. (BNSF Brief,

p. 17). It is the message communicated at least 80 years ago to Olson and his predecessors that is crucial.

Once again, on page 18 of its brief, BNSF tries to characterize the case by asserting that we are trying to establish an easement. There is an easement and has been in place for a very long time and that the railroad wrongfully blocked it. Incidentally, BNSF cites Griffeth v. Eid, 1998 ND 38 ¶¶10 & 12, 573 N.W.2d 829, noting that an easement by implication arises when there is no other reasonable mode of enjoying the dominant tenement without the easement. *That was exactly the case from before 1925 to* about 1950 when Highway 81 was re-routed.

I. The District Court had subject matter jurisdiction.

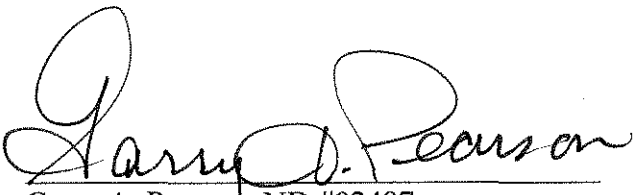
Another new issue is raised at page 20 of BNSF's brief, in the form of a lack of subject matter jurisdiction. BNSF says we should have petitioned the Public Service Commission, the North Dakota DOT, the City of Grand Forks or some other road authority to establish a public road. This is a proverbial upside down argument and is the pot calling the kettle black.

First of all, HOE is not seeking to establish an easement; it is already there and has been for several generations. Second, the land underlying the crossing is owned by BNSF and establishing a road would require eminent domain and money. Finally, it is BNSF that should have petitioned under § 24-09-10, N.D.C.C., for permission to close the crossing. BNSF has admitted they did no such thing. (Aff. Garry Pearson).

III. CONCLUSION.

For the reasons stated above, the decision of the District Court must be reversed and the matter returned to the District Court for trial.

Dated this 28th day of March, 2007



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IN THE SUPREME COURT

Home of Economy, a North Dakota Corporation,	)	
	)	Civil No. 03-C-1320
Plaintiff,	)	Supreme Court No.: 20070002
	)	**AFFIDAVIT OF SERVICE BY EMAIL**
v.	)	
	)	
Burlington Northern Santa Fe Railroad, a National Railroad Corporation,	)	
	)	
Defendant.	)	
STATE OF NORTH DAKOTA	)	
	) ss.	
COUNTY OF GRAND FORKS	)	

Marie A. Adams being first duly sworn, deposes and says: that she is of legal age, a resident of the United States, and is not a party to, nor has she an interest in the above entitled action; that on the 28th day of March, 2007, she emailed a true and correct copy of the following documents filed in the above-entitled matter:

- **Reply Brief of Appellant**

That said email address was as follows:

Stephen W. Plambeck
splambeck@nilleslaw.com

To the best of affiant's knowledge, information, and belief, such email address as given above was the email address of the party intended to be so served.

Marie A. Adams

Marie A. Adams

Subscribed and sworn to before me on the 28th day of March, 2007.

Mary K. Bachmeier

Notary Public
Grand Forks County, North Dakota

MARY K. BACHMEIER
NOTARY PUBLIC
STATE OF NORTH DAKOTA
My Commission Expires: Sept. 23, 2012

My Commission Expires:
(seal)