IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1996 Term

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No. 24744

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A & M PROPERTIES, INC.
Plaintiff Below, Respondent

v.

NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY,
A SUBSIDIARY OF NORFOLK SOUTHERN CORPORATION
Defendants Below, Petitioner

_____

Certified Question from the Circuit Court of Jefferson County
Honorable David H. Sanders, Judge
Civil Action No. 95-C-224

CERTIFIED QUESTION ANSWERED

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Submitted: May 13, 1998
Filed: July 15, 1998

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JUSTICE McCUSKEY delivered the Opinion of the Court.

JUSTICE STARCHER dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

. 1. "Railroads heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as shall be prescribed by law; and the legislature shall, from time to time, pass laws, applicable to all railroad corporations in the State, establishing reasonable maximum rates of charges for the transportation of passengers and freights, and providing for the correction of abuses, the prevention of unjust discriminations between through and local or way freight and passenger tariffs, and for the protection of the just rights of the public, and shall enforce such laws by adequate penalties." *The Constitution of West Virginia*, Article XI, Section 9.

2. "Railroads are generally incorporated and operated as private companies. The capital comes from private investors and the profits are likewise returned to the private sector. Despite this fact, however, railroads are not viewed strictly as private corporations since they are publicly regulated common carriers. Essentially, a railroad is a highway dedicated to the public use. This dedication imparts to the railroad the status of a quasi-public corporation." *Marthens v. B & O Railroad Co.*, 170 W.Va. 33, 37, 289 S.E.2d 706, 711 (1982) citing *Eckington & Soldier's Home R. Co. V. McDevitt*, 191 U.S. 103, 24 S.Ct. 36, 48 L.Ed. 112 (1903); *United States v. Trans-Missouri Freight Assoc.*, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007 (1897).

3. "The public easement in the public highways, including roads, streets, alleys, and other public thoroughfares, dedicated to the use of the general public by individuals, or under the right of eminent domain, is such property, and cannot be lost to the people by the negligence of public officials or the unlawful acts of individuals." Syllabus point 4, *Ralston v. Town of Weston*, 46 W.Va. 544, 33 S.E. 326 (1899).

4. "An individual cannot destroy such easement by setting up a claim by prescription, adverse possession under the statute of limitations, or equitable estoppel, as the people cannot be deprived of their sovereign rights in any of these ways." Syllabus point 5,

Ralston v. Town of Weston, 46 W.Va. 544, 33 S.E. 326 (1899); *Huddleston v. Deans*, 124 W.Va. 313, 21 S.E.2d 352 (1942); *Bauer Enterprises v. City of Elkins*, 173 W.Va. 438, 317 S.E.2d 798 (1984).

5. Under Article XI, Section 9, of the Constitution of West Virginia, the track of a railroad is to be considered a public highway. As neither adverse possession, prescriptive easement, nor equitable estoppel may lie against a public highway, no party may establish an interest in the trackway of a railroad through any of these methods, so long as the trackway continues to be used for railroad purposes.

McCUSKEY, Justice:

This certified question comes before the Court upon the petition of Norfolk & Western Railway Co., defendants in a suit in the Circuit Court of Jefferson County. Respondent had commenced a civil suit in the Circuit Court of Jefferson County seeking declaratory judgement that it had obtained a prescriptive easement across active railroad trackage owned in fee simple by the Petitioner, thereby creating a private railroad grade crossing. The circuit court allowed Petitioner's motion to dismiss, in which Petitioner averred, that, as a matter of law, prescriptive easement could not lie against the trackway of a railroad. Respondents filed a motion to alter or amend the judgement, or in the alternative to certify the question. In response to this motion the circuit court altered its answer,

allowing prescriptive easement to lie against the trackway of a railroad and certified the question to this Court. For the reasons enumerated below, we answer the certified question in the negative.

I.

FACTUAL AND PROCEDURAL HISTORY

A & M Properties, Inc. (A & M) is the owner of a tract of property in Shepherdstown District, Jefferson County, West Virginia. The Norfolk & Western Railway Co., (N & W) a subsidiary of Norfolk Southern Railway Co., owns a sixty-six foot wide strip of real property running through Shepherdstown District, upon which is laid the trackbed of the Norfolk & Western Railway and which is, for a segment of its length, adjacent to the tract owned by A & M. A &

M purchased the aforementioned tract on May 14, 1990, and for a period after that time, along with its various invitees and licensees, made use of a dirt road which extended across the tracks of the Norfolk & Western Railway Co.

A & M claimed that it made use of the crossing over N & W's tracks as a matter of right. A & M also claimed that the railroad had notice of its use from the existence of the crossing and the position of certain buildings on the tract. As N & W had never ordered

A & M to desist, A & M's belief was that it had implicit permission from N & W to continue to use the crossing.

In April of 1995, the events which gave rise to this suit transpired. N & W prevented the further use of the grade crossing by A & M by placing a gate across the road on either side of the tracks. Later, the entire portion of the crossing which was on N & W's property was removed by N & W personnel.

Subsequently, A & M brought suit against N & W in the Circuit Court of Jefferson County. A & M alleged that the use of the grade crossing was open and notorious, continuous and uninterrupted for a period of five years on its part, and for more than ten years when the use of the crossing by its predecessors in title was tacked; thus, A & M had established a valid prescriptive easement to cross the track of the Norfolk & Western Railway Co. in the location of the grade crossing.

A & M also asked for $10,000.00 in damages as compensation for its inconvenience, deprivation of access, property damage, and additional costs resulting from the destruction of the grade crossing.

N & W made a motion to dismiss alleging that a prescriptive easement would not lie against a railroad trackway, due to the functional equivalence of a railroad to a public highway. The Circuit Court of Jefferson County granted N & W's motion to dismiss. However, the Circuit Court of Jefferson County then granted A & M's motion to alter or amend the judgment and certified the following question to this Court: "Whether West Virginia law provides a cause of action for prescriptive easement against property owned in fee simple by a railroad." The facts of this case, however, show that the

easement sought by plaintiff was made not merely against property owned in fee simple by a railroad, but upon the actual trackway of the railroad. Therefore, answering this question in the context of these particular facts, it is the opinion of this Court that it does not.

II.

STANDARD OF REVIEW

The standard of review to be applied in reviewing a certified question was recently set forth in Syllabus Point One of *Gallapoo v. Wal-Mart Stores, Inc.* 197 W.Va. 172, 475 S.E.2d 172 (1996), wherein we held that "[t]he appellate standard of review of questions of law answered and certified by a circuit court is *de novo*."

III.

DISCUSSION

It is axiomatic to state that the Constitution of West Virginia is the supreme law of this State. In that august document we find language to the effect that "[r]ailroads heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways . . . ." *Constitution of West Virginia*, Art. XI, §9. This was no innovation by our founders, for, as Lord Chief Justice Hale noted more than three hundred years ago in the legal treatise "De Portibus Maris", "if a man set out a street in or near a building on his own land, it is no longer bare private interest, but is affected by a public interest." Lord Chief Justice Hale, "De Portibus Maris", *in*, 2 *Hargrave's Law Tracts*, 78 (Hargrave, ed.) *quoted in Laurel Fork &*

Sand Hill Railroad Co. v. West Virginia Transportation Co., 25 W.Va. 324, 336 (1884). This ancient doctrine regarding construction of private thoroughfares for public use, no less relevant now than when it was first enunciated, is the hinge upon which the issue presented by this case turns.

Railroads in West Virginia have traditionally been recognized as uniquely situated corporations. No less than five sections of Article XI of the Constitution of this state deal with railroads. The special status of railroads as quasi-public corporations was foremost in the minds of the framers of our Constitution. Only twelve years after the adoption of our current Constitution, this Court addressed its provisions concerning railroads and found that the result of the

combination of these provisions was that railroads had the status of a quasi-public corporation. *Laurel Fork & Sand Hill Railroad Co. v. West Virginia Transportation Co.*, 25 W.Va. 324 (1884).

As recently as 1982, this Court continued to state that railroads have a dual public-private status. In that year, Justice Neely provided a clear exposition of the traditional current of thought regarding the status of railroads when he stated that despite the fact that they were private corporations "railroads are not viewed strictly as private corporations since they are publicly regulated common carriers. Essentially, a railroad is a highway dedicated to the public use. This dedication imparts to the railroad the status of a quasi-public corporation." *Marthens v. B & O Railroad Co.*, 170

W.Va. 33, 37, 289 S.E.2d 706, 711 (1982) citing *Eckington & Soldier's Home R. Co. V. McDevitt*, 191 U.S. 103, 24 S.Ct. 36, 48 L.Ed. 112 (1903); *United States v. Trans-Missouri Freight Assoc.*, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007 (1897).

It is the opinion of this Court that a departure from the plain and unambiguous language of our Constitution and from over a century of precedent is not advisable. Therefore, this Court finds that a railroad is, as the Constitution says, a "public highway." *Constitution of West Virginia*, Art. XI, §9. Having acknowledged this to be true, application to the case at bar is clear. It has been settled law in this State for almost a century that "[t]he public easement in the public highways . . . dedicated to the use of the public by

individuals . . . cannot be lost to the people by . . . the acts of individuals." Syllabus point 4, *Ralston v. Town of Weston*, 46 W.Va.544, 33 S.E. 326 (1899). Here, despite A &M's prior use of the crossing, they are not entitled to have continued rights to use it as they may not appropriate the property of a quasi-public corporation which is used in the public interest by "prescription, adverse possession under the statute of limitations, or equitable estoppel, as the people cannot be deprived of their sovereign rights in any of these ways." *Bauer Enterprises v. City of Elkins*, 173 W. Va. 438, 317 S.E.2d 798 (1984); *Huddleston v. Deans*, 124 W.Va. 313, 21 S.E.2d 352 (1942); Syllabus Point 5, *Ralston v. Town of Weston*, 46 W.Va. 544, 33 S.E. 326 (1899).

Respondent cites *Dulin v. Ohio River Railroad Co.*, 73 W.Va 166, 80 S.E. 145 (1913), as controlling authority for the proposition that a prescriptive easement may be created within a railroad right-of-way. There are major factual distinctions between this case and *Dulin*. *Dulin*, for example, involved a mere easement to the railroad to cross the land of a dominant estate, not, as in this case, a trackway owned in fee simple by the railroad. The successors in interest of the grantor of the easement to the railroad subsequently claimed they had cultivated a small strip within the granted easement for the requisite number of years to establish title by adverse possession. This Court in *Dulin* found against these plaintiffs, and explicitly noted that they had not adversely possessed the land in question as their "cultivation of a portion of the right-of-way land

was not necessarily hostile or adverse to the railroad company's right." *Dulin*, 73 W.Va 166, 172, 80 S.E. 145, 147. Justice Williams, writing for the majority in *Dulin*, noted parenthetically that "Judge Miller and myself think that the doctrine of adversary possession does not apply to a railroad company's right of way, and the other members of the court hold that it does" *Dulin*, 73 W.Va. at 170. Adverse possession against the trackway of a railroad *might* be said to exist under this ambiguous language. However, this hypothetical language was mere dicta in *Dulin* and will not stand as precedent under our policy that "[o]*biter dicta* or strong expression in the Court's opinion, where such language was not necessary to the decision of the case, will not establish a precedent." *In re Kanawha Valley Bank*, 144 W.Va. 346, 382, 109 S.E.2d 649, 669 (1959),

quoting Chesapeake & Ohio R. Co. v. Martin, 154 Va. 1, 152 S.E. 335 (1930). Therefore, in light of this policy and to put an end to any latent ambiguity remaining as a result of *Dulin*, this Court feels compelled to set forth an unambiguous standard in the light of the unambiguous language found in our Constitution.

While this Court has not been presented with this issue for many years, the Supreme Court of Virginia has seen it quite recently in the case of *Norfolk & Western Railway Company V. Waselchalk*, 244 Va. 329, 421 S.E.2d 424 (1992). In that case the Supreme Court of Virginia cited the principle established in *City of Lynchburg v. Chesapeake and Ohio Ry.* 170 Va. 108, 195 S.E. 510 (1938), that "no prescriptive right can be acquired in property affected with a

public interest or dedicated to a public use." *City of Lynchburg v. Chesapeake and Ohio Ry.* 170 Va. at 116, 195 S.E. at 514. The Supreme Court of Virginia then added that "[t]here can be little doubt that this railroad property is affected with a public interest" as numerous trains passed over the crossing each day, exactly as they do through the grade crossing in Shepherdstown which is of particular concern in this case. *Waselchalk*, 244 Va. At 330, 421 S.E.2d at 425.

We approve of this stance of the Supreme Court of Virginia. As under Article XI, Section 9 of the Constitution of West Virginia, the track of a railroad is to be considered a public highway. As neither adverse possession, prescriptive easement, nor equitable estoppel may

lie against a public highway, no party may establish an interest in the trackway of a railroad through any of these methods. This is, of course, subject to the limitation implied by *Marthens, supra,* and supported by *Waselchalk, supra,* that the trackway must be in use for railroad purposes.

To those who claim that this standard grants too much protection to railroads, it must be remembered that it is founded in our Constitution and also, that in exchange for such special protection as our Constitution gives to the trackway of a railroad, there are equal and opposite responsibilities enjoined upon these quasi-public corporations. This principle is not an innovation, but is as old as our nation. Lord Ellenborough noted that if a landowner or corporation

would take the benefit of providing a public service, "he must as an equivalent perform the duty attached to it on reasonable terms." *Aldnutt v. Ingels*, 104 Eng. Rep. 206, 211, 12 East 527, 537 (K.B. 1810). Railroads are not free to act in numerous intimate functions of their business in which normal corporations are at liberty to act as they please without any restraint save that of the market; rather, they are governed by the state as to the rates which they charge and in the employment of their property which is devoted to a public use. Syllabus Point 3, *Laurel Fork & Sand Hill Railroad Co. v. West Virginia Transportation Co.*, 25 W.Va. 324 (1884).

Not only are the fundamental principles of our law engaged here, but there are sound policy reasons for this stance as well. This

Court does not wish to encourage the creation of impromptu, non-marked, grade crossings by every property owner who wants to create a shortcut across the trackway of a railroad. The dangers to public safety of such a practice, especially when continued for such an amount of time as to establish adverse possession or a prescriptive easement in a grade crossing, are all too high. It is equally true that the inconvenience to railroads of being forced to maintain grade crossings created at any place a hostile party chose would unnecessarily burden the flow of goods and services to consumers.

IV.

CONCLUSION

We reiterate that, for the reasons explained above, under Article XI, Section 9, of the Constitution of West Virginia, the track of a railroad is to be considered a public highway; as neither adverse possession, prescriptive easement, nor equitable estoppel may lie against a public highway, no party may establish an interest in the trackway of a railroad through any of these methods, so long as the trackway continues to be used for railroad purposes. Therefore, the amended question certified from the Circuit Court of Jefferson County is answered in the negative, and this matter is remanded to that Court for further proceedings.

Certified Question Answered.