

# Easements – Under, Over, Across and Along the Right-of-Way

**KEVIN D. BRONS**  
Omega Rail Management  
Nashville, Tennessee  
[www.omegarail.com](http://www.omegarail.com)

**ALLISON I. FULTZ**  
Kaplan Kirsch & Rockwell LLP  
Washington, DC  
[www.transitattorneys.com](http://www.transitattorneys.com)  
[www.kaplankirsch.com](http://www.kaplankirsch.com)

**2012 Commercial Insurance Associates, LLC  
Rail Seminar  
May 18, 2012**



**KAPLAN KIRSCH ROCKWELL**



# OVERVIEW

- ▶ Case study
  - ▶ Parcel of residential/agricultural property
  - ▶ Existing private grade crossing to access property crosses rail line
  - ▶ Right to grade crossing never formally granted – no written instrument
  - ▶ Rail line is OPERATED by railroad
  - ▶ Rail line is OWNED by County

# OVERVIEW

- ▶ First: Know the quality of title in your right-of-way
- ▶ Easements and other property rights affecting rail rights-of-way
  - ▶ Unique interaction of federal and state law
  - ▶ Exercise of many property rights preempted or limited by federal law
  - ▶ Easement cannot pose “unreasonable interference” with freight rail operations

# OVERVIEW

- ▶ **Federal Agencies**
  - ▶ **Surface Transportation Board (STB)**
    - ▶ Licensing and economic regulation of railroads
  - ▶ **Federal Railroad Administration (FRA)**
    - ▶ Safety and technical standards

# OVERVIEW

- ▶ Preemption – applicable statutes
  - ▶ Interstate Commerce Act, as revised - 49 USC 10101 *et seq.*
    - ▶ Broad jurisdiction to STB over “transportation by rail carrier”
    - ▶ Property, facilities, instrumentalities or equipment of any kind related to such transportation. 49 USC 10102(9)
    - ▶ Remedies provided under Act with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law. 49 USC 10501(b)

# OVERVIEW

- ▶ Preemption – does the proposed use interfere?
  - ▶ Exercise of eminent domain powers
  - ▶ Grade crossings – public and private
  - ▶ Easements/Leases/Licenses
  - ▶ Prescriptive rights, adverse possession
- ▶ Analysis based on facts of specific circumstances

# PRACTICAL TIPS

- ▶ Road crossings
  - ▶ Largely state-regulated; Federal equipment safety requirements apply
  - ▶ Public
  - ▶ Private

- ▶ Right of way owners
  - ▶ Railroad operating easement
  - ▶ Utility easements
  - ▶ Trackage rights and side track agreements
  - ▶ Leases and Licenses
  - ▶ Claims of prescriptive rights
  - ▶ Encroachments
  - ▶ Risk allocation



- ▶ Operating Railroads
  - ▶ Communication with owner of right-of-way
  - ▶ Technical standards
  - ▶ Risk allocation

- ▶ Utilities and Contractors
  - ▶ Licenses, rights of entry onto right-of-way
  - ▶ Railroad crossing specifications
  - ▶ Risk allocation

# RISK MANAGEMENT

- ▶ General Principles
  - ▶ Situational awareness
  - ▶ Keep in touch with counsel
  - ▶ Put it in writing

# RISK MANAGEMENT

## ► Insurance

- Property insurance
- Commercial general liability
- Railroad protective liability
- Environmental liability
- Business interruption
- Specialized policies

# QUESTIONS?

## **Kevin D. Brons**

Omega Rail Management

Nashville, TN

(800) 990-1961

kbrons@omegarail.com

www.omegarail.com

## **Allison I. Fultz**

Kaplan Kirsch & Rockwell LLP

Washington, DC

(202) 955-5600

afultz@kaplankirsch.com

www.transitattorneys.com

www.kaplankirsch.com

