

RAILROADS AND UTILITY LINES—THE LESSONS OF THE INDIANA GAS CASE

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THE FACTS

- Indiana Gas is an Indiana for-profit corporation and is a public utility operating under the laws of the State of Indiana and regulated by the State of Indiana through the Indiana Utility Regulatory Commission.
- Louisville & Indiana Railroad is a railroad company that owns

- trackage and/or
- easements and/or
- other ROW and/or
- fee title
- to the land upon which its trackage rests
- and is subject to some rules and regulations
- Of the U.S. Department of Transportation

- During the week of November 11, 1999, Indiana Gas installed a two-inch steel line, at a depth of approximately fourteen (14) feet, under and perpendicular to the Railroad's tracks at the County Road 550 North crossing in German Township, Bartholomew County, Indiana.
- The railroad runs parallel to U.S. 31 at this location

- During the week of May 11, 2000 Indiana Gas installed a two-inch steel line, encased in a six-inch steel casing, under and perpendicular to the Railroad's tracks at the County Road 400 South crossing in Wayne Township, Bartholomew County, Indiana. This two-inch, encased pipeline was installed six (6) feet beneath the railroad tracks.
- This area is more rural and not located near a major roadway

- The pipeline crossing the Railroad's tracks at CR 400 South is encased in a metal pipe.
- Indiana Gas made the decision not to encase the two-inch steel pipeline at CR 550 North based on the following non-exhaustive list of factors: engineering principles, stress loads, depth of pipe, diameter of pipe, and type of soil.
- The pipeline at the CR 400 South crossing was installed in the county's right-of-way. .
- The pipeline at the CR 550 North crossing was installed in the county's right-of-way

THE HOLDING

- Relying on IC §§ 8-1-23-3 and 8-20-1-28, and *Fox v. Ohio Valley Gas Corporation*, 250 Ind. 111, 235 N.E.2d 168 (1968), the Indiana Supreme Court held that Indiana Gas was allowed to place its facilities in the county's right of way without seeking the permission of, or making payment to, the Louisville & Indiana Railroad.

THE REAL CRUX OF THE CASE

- The suit began by the railroad suing in state court seeking an injunction and or damages
- It wanted to enjoin Indiana Gas from constructing the two lines
- Unless Indiana Gas did so pursuant to the RR standards
- and under a license it dictated the terms of

- While there were several issues raised at the trial court level
- Such as the quality on the railroads claimed interest in the land at the two crossings, and
- whether Indiana Gas used an acceptable standard in its design of the crossing, and
- Whether the gas pipeline constituted a hazard to the railroad if the pipeline as not encased in steel

- The ultimate issue turned on the application of a statute
- First written in the early 1900's
- And first written to apply to electric power lines
- But only later amended to include utilities generally

- That statute provides
- **IC 8-20-1-28**
Public and municipally owned utilities; poles, facilities, appliances, and fixtures
Sec. 28. Public and municipally owned utilities are authorized to construct, operate, and maintain their poles, facilities, appliances, and fixtures upon, along, under, and across any of the public roads, highways, and waters outside of municipalities, as long as they do not interfere with the ordinary and normal public use of the roadway, as defined in IC 9-13-2-157.

- **However, the utility shall review its plans with the county executive before locating the pole, facility, appliance, or fixture. The utility may trim any tree along the road or highway, but may not cut down and remove the tree without the consent of the abutting property owners, unless the cutting or removal is required by rule or order of the Indiana utility regulatory commission. The utility may not locate a pole where it interferes with the ingress or egress from adjoining land. (Formerly: Acts 1905, c.167, s.38; Acts 1911, c.161, s.1.) As amended by P.L.86-1988, SEC.181; P.L.2-1991, SEC.62.**

- It was this statute that was the decision platform for the Indiana Supreme Court
- Citing *Fox Valley*
- The court noted that this statute had been interpreted to allow a public utility place facilities in the public ROW without payment to landowners
- Because the use did not place an additional burden on the subservient landowner

- In this case the court said, in addressing the issue of the quality of the railroad's title
- That it did not matter whether the RR had fee title or only an easement
- If it owned fee title, *Fox Valley* directly applied
- And the fee owner is not entitled to any compensation from the utility
- If the RR interest is only an easement

- It does not possess any rights
- Greater than the underlying fee owner
- And no compensation would be due.
- The court did note that the statute makes the utility responsible for burdens
- Its use may impose on the normal public use of the roadway
- And that common law precepts would apply to protect the RR

- In the “peacefull and efficient” use of its tracks to facilitate commerce.
- Thus, the court said:

- *For these reasons, consultation about the nature and timing of construction at such intersections is obviously in the best financial interest of all concerned (as utility company signs sometimes say, “Call before you dig.” 829 N.E. 2d 12*

- Several lessons seem obvious from this case
- First, if you are in the public right of way the RR title is not relevant since no compensation must be paid
- A natural corollary to that would likely be that there is no obligation to pay for inspectors, or flagmen, or plan review or any expense the RR may try to collect

- In fact, all that is required is notification and consultation about what is planned and when.
- The RR, however cannot now claim the right to stop the work unless the utility agrees to a license agreement, to pay fees, to pay flagmen or inspectors, or require it to be built the RR way
- So long as the planned construction does not interfere with the RR peaceful and efficient use of it tracks