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I. The Centerville Railroad[1]

Tom Heckman brought the aging 0-6-0 steam engine to a stop near the Village of Bellona on the single-track branch line that connected Mariesville seventeen miles to the south of Bellona with a few other small Pennsylvania towns, finally terminating at a main line twenty-two miles further to the north. It had been a cold and gray October day, and as the afternoon wore on it had become very damp. Heckman did not care. He stayed in the open-backed engine cab, but the heat from the boiler and from the fire box when he opened it to add coal (which he did with unnecessary frequency) kept him dry and reasonably warm. He peered back past the small slant-backed tender to watch Mike Loury climb down from the flat car at the end of the two-car consist and walk back to the switch that the train had just passed over. Loury threw the switch and waved mechanically to Tom, who slowly backed the train onto the short siding leading down to the Raguson Rug Warehouse a few hundred feet to the south. As the train slowly backed over the switch, Loury swung himself onto the ladder of the tank car positioned between the tender and the flat car and rode back down the siding. As the train crept toward the freight platform at the back of the warehouse, Loury waved to the engineer who brought the train to another stop.

Tom Heckman was approaching retirement from a job that had been far less than he had hoped. In his early years, he had pictured himself as an engineer on mainline passenger runs, with all of the glamour that job had held earlier in the 20th century. On his best days, he ran short-haul freight trains within the state, and now had been relegated to yard duty and occasional maintenance-of-way tasks. This day he looked tired. In recent years, he always looked tired. Loury was a younger, unmarried man in his mid-40's, whose primary concern in life was to be comfortable. Today, he was not. The day had turned colder than he had anticipated, and the dampness was numbing. He was underdressed, cold and unhappy. The job of "oiling" the ballast to kill off any plants that might have had the misfortune to commence life along the tracks was hardly

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1. The Centerville Railroad scenario is purely fictional, and is not intended to and does not describe actual occurrences. The names of characters, railroads and companies in the Centerville story are fictional and are not intended to be the names of real persons or companies living, existent, deceased or terminated.

important to him. In fact, no job he did for the Centerville Railroad Company was important to him, but it did provide a paycheck. The only good news was that the day was almost over and the tank car was almost empty. He turned the valve on the tank car that allowed the oily contents to spray through the perforated tubes under the tank. The tubes spanned the width of the track and three feet beyond the outside of the rails on both sides of the car. He once again waved to Tom Heckman. Tom released the brake and eased the throttle forward, and the engine slowly began to retrace its way up the tracks to the switch. Loury climbed onto the rungs at the back of the flat car and held onto the side of the car until the train once again passed the switch. He noted with indifference that the tank car had run dry and had ceased spraying before the train had made it halfway up to the switch.

Heckman stopped the train briefly while Loury once again threw the switch and then trudged toward the engine and clambered aboard. At least Mike would be warm near the open fire box in the engine cab. Mike plunked himself down into a slumping position on the fireman's pull-down seat and took out his weather-beaten notebook. He dutifully noted, albeit untruthfully, that the defoliation of Raguson Rug siding had been completed. It was almost true, he thought to himself as he replaced the notebook in his hip pocket. Anyway, no one would know the difference.

Magnus Raguson wandered slowly through the back of the wood-frame warehouse that housed his entire business and finally stepped onto the loading platform for another smoke. He had heard the train working his siding and uncaringly looked to the right as the train started to move away from the switch. As the shadows lengthened over the countryside, the train seemed to grow smaller as it lumbered northward up the rail toward the modest freight yard at Centerville where the maintenance-of-way equipment was stored, and then it disappeared completely as it rounded the bend at Young's Farm. Magnus flicked the remnants of his Chesterfield onto the track bed and re-entered the warehouse.

Some years later, Jim Mays backed a small diesel engine pushing three standard forty-foot boxcars down the Raguson Rug siding and "spotted"[2] the rear boxcar alongside the platform at the

2. Placed.

back of the warehouse. John Munster disconnected the boxcars and climbed into the engine with Mays. They had a lot more freight to move that day.

Tony Longo had been the warehouse foreman for far more years than he cared to remember. He and a crew of three younger and stronger men busied themselves with the task of lugging over a hundred rugs from the rear boxcar into the warehouse. The other two boxcars, which contained nothing for Raguson, were north of the warehouse platform, which was only twenty feet in length. The middle boxcar was an "empty" that had been picked up from the siding that ran to the back of Cooney's Hardware Store in the Village of Dundee six miles to the south. The northerly-most boxcar bore the legend "4136 - Geneva Short Line Railroad." It was laden with canisters picked up at the McGreevy Manufacturing Company, a medium-sized electronics plant at the south end of the branch line in Mariesville. Shortly after the three boxcars had been positioned, a nondescript grayish material began to seep slowly from the GSL boxcar. That boxcar had been built in the 1930's and was a standard double-sheathed wood car with steel dreadnought ends. Its tuscan color was badly faded and the surface was darkened by years of service without regular maintenance. Several of the wood upright sheathing boards were rotting at the base. The slimy substance escaped through the bottom of a pair of boards near the south end of the car. It oozed slowly over the steel "L" beam base plate that ran the length of the base of the box and dripped methodically onto the fringe of the track ballast, near the rear truck of the boxcar. Within an hour the paint was gone from the portion of the base plate over which the substance moved, and from the bottom rung of the boxcar's ladder onto which it dripped before completing its journey to the earth.

Tony Longo and his crew worked until some time after 3:00 P.M. on that hot and humid afternoon. The temperature inside the all-steel boxcar that contained the Raguson shipment was well over 100 degrees, and by mid-afternoon fatigue made any further movement of rugs impossible. The following day, Tony's men finished emptying the boxcar, and if any of them had noticed the leak from the GSL boxcar to the right of the warehouse, none of them paid it any attention. Two days later, the three boxcars were gone and the siding was empty as usual. Raguson only received four or five rug shipments each year. The dead raccoon near the spot where the leak had occurred went unnoticed for weeks. When it finally was discovered by two boys walking along the siding, it elicited nothing more than a casual comment.

In 1982, Frank Raguson, the last member of the Raguson family, sold the warehouse property. The family rug business had failed many years earlier and the warehouse had fallen into disrepair beyond salvage. The purchaser was Eugene Lawler, a New Yorker who dabbled in Pennsylvania real estate. Gene bought the property in an "as is" condition. While the deserted warehouse continued to deteriorate, the rails for the Raguson Rug siding were taken up by the railroad in 1983. By 1990, all the rails of the branch line had been removed as well, from Mariesville all the way north to Centerville.

The Village of Bellona had gone downhill in the 1960's and was fairly depressed in the 1970's, but as the new millennium approached the town's fortunes had turned up dramatically. The old Raguson Warehouse site became a prime choice location for residential development. Gene Lawler contracted to sell the property to Macro Builders Corp., owned principally by local developer Terry McElgin, and all was well with the world. At least, that was true until Terry received his Phase II Environmental Report.

II. The Problem

A. The Spread of Railroads in the United States

Railroads were first introduced into the United States in 1831 with a fifteen-mile run from Albany, New York to Schenectady, New York.[3] By 1848, railroads had already become the major means of transportation in the eastern part of the United States, with almost 6,000 miles of rail along the Atlantic seaboard.[4] In 1869, at Promontory, Utah, the "Golden Spike" joined the Union Pacific and Central Pacific railroads, thus completing the transcontinental railroad.[5] As a result, railroads linked the Atlantic and Pacific coasts of the country and opened the West to settlement. American businesses were provided with the mechanism for transporting their products and wares to their customers. Almost instantly, railroads became the major means of transportation of

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3. William H. Brown, *The History of the First Locomotives in America*, <http://www.history.rochester.edu/steam/brown/chp34.html>.

4. Encarta Concise Encyclopedia, *Railroads*, <http://encarta.msn.com/find-/article.asp>.

5. *Two Centuries of Railroading: A Chronology*, <http://www.aar.org/comm-/statfact.nsf>.

people and freight across the United States. Railroads remained the dominant means of transportation until the 1950's, when air travel and the automobile greatly diminished the importance of railroad passenger service. The trucking industry also significantly reduced America's dependence upon the railroad for the movement of freight.

Nonetheless, thousands of trains still move along railroad tracks in the United States each day. Notwithstanding the highly publicized mergers and bankruptcies that have plagued the railroad industry and the fall of the flags of some of the best known names in railroading, 553 railroads still continue to operate in the United States,[6] with approximately 1,200,000 active freight cars.[7] Today, 95% of railroad business comes from hauling freight—some 1.36 trillion ton-miles a year.[8] Transportation by airplane may be faster, but trains carry vastly more tonnage—38% of all freight shipped in the United States.[9] The railroads utilize approximately 147,210 miles of track,[10] and as many as 10,000 freight trains, some of them over 200 cars long, move about the country each day.[11]

B. Railroads and the Risk of Environmental Contamination

The enactment of environmental protection and remediation laws by Congress and state legislatures over the past three decades has had a major impact on America's railroads. Generally, American law starts with the simple principle that the person or entity who causes damage to the property of others is responsible for that damage. Notwithstanding the general principle relating to causation, American environmental law imposes primary responsibility for the clean-up of environmental damage upon a small category of persons, including the owner of the contaminated

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6. *Rail Service in the United States*, <http://www.aar.org/rrstates.nsf>.

7. *See Railroad Tank Cars—The Safe Way to Ship Hazardous Materials*, <http://www.aar.org/comm/statfact.nsf> (16% of the nation's fleet of freight cars is composed of almost 200,000 tank cars).

8. *Two Centuries of Railroading: A Chronology*, *supra* note 5.

9. Encarta Concise Encyclopedia, *Transportation*, <http://encarta.msn.com-/find/article.asp>. Only ships carry more tonnage of freight than railroads, but ships are not a threat to rail service.

10. *Id.* The railroad reached its peak of 254,000 miles of track in 1916. Encarta Concise Encyclopedia, *Railroads*, *supra* note 4. Almost no new track has been added to the American rail network since 1910. *Id.*

11. 17 THE WORLD BOOK ENCYCLOPEDIA, *Railroads* (World Book, Inc. 1988).

property. However, where the actual perpetrator of the environmental harm can be identified, and can be proved to have been the cause of the contamination, the owner can attempt to shift liability or at least to seek some contribution or reimbursement for its costs of clean-up. The real issue is, where the evidence is inconclusive or where there is no evidence to identify the person or entity who caused the environmental damage, who *should* be responsible for the clean-up? Current federal and state environmental laws impose upon the owner of the real estate strict liability for responsibility in avoiding environmental contamination and for performing remedial clean-ups. Under certain circumstances, state and federal environmental laws have also imposed the strict liability standard on transporters of hazardous substances, as well as on those who arrange for the disposal of those substances, for this same responsibility.

What has this to do with the railroad industry? Rail transportation accounts for approximately 40% of ton-miles of hazardous substances transported yearly.[12] In 1991, railroads generated 65.9 billion hazardous substance ton-miles on movements greater than 200 miles.[13] Approximately 200,000 tons of hazardous wastes (as distinguished from hazardous substances in general) are transported by rail in the United States each year.[14] With the quantities of hazardous materials and wastes being transported and with the aging of the railroad systems, it is inevitable that accidents and spills involving hazardous materials and wastes can and do occur. Each year approximately 1,000 railroad accidents involving hazardous materials are reported to the United States Department of Transportation (the "DOT").[15] In 1995, 21 of these accidents

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12. 19 THE WORLD BOOK ENCYCLOPEDIA, *Transportation* (World Book, Inc. 1988).

13. *Railroad Tank Cars—The Safe Way to Ship Hazardous Materials*, *supra* note 7; *see also* U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, TRANSPORTATION OF HAZARDOUS MATERIALS: STATE AND LOCAL ACTIVITIES, OTA-SET-301, at 3 (Washington, D.C.: U.S. Gov't Printing Office, Mar. 1986) (reporting that in 1983, more than 4 billion tons of hazardous products and waste were transported throughout the United States by rail and by other methods).

14. *Transporting Hazardous Wastes: A Situation Under Control*, <http://204.241.92.60/eii/garbage/hazwaste.htm>.

15. National Research Council, *Safety of Railroad Tank Car Designs Must Be Assessed More Systematically*, <http://www2.nas.edu/whatsnew/2302.html>. And this figure does not include spills or leaks that went unnoticed or unreported.

were serious enough to require evacuations.[16] Excluding the danger posed to public safety, however, the worst part of these accidents is that when railroads transport these materials and wastes, they do not use public highways, airways or waterways as trucking companies, airlines and shipping companies do. The railroads usually travel over easements and rights of way over privately owned lands. Whenever spills and releases of hazardous materials and wastes from railroads occur, privately owned lands may be polluted, and the owners of such lands must be concerned that they will be liable for the remediation.

And yet these owners of property along which railroads continue to travel are aware that the trains are there and that a release of hazardous substances may occur or may have occurred. The owners of lands over which railroads or railroad sidings *used* to run face a more difficult circumstance.[17] These landowners may have no idea that, many years earlier, railroads or railroad sidings may have crossed over their properties and caused environmental contamination to those properties. Even a Phase I Environmental Report may not disclose the existence of railroad sidings or easements: (a) because the easements in favor of the railroad may never have been recorded (or may not even have been the subject of a written agreement); (b) because the environmental specialist may not have had access to maps which disclose the presence of a railroad siding (or even, for that matter, the spur line to which the siding was connected); or (c) because the railroad siding and/or spur line may have been removed so long ago that neighbors who may be asked about the history of the property would themselves not have known that a railroad line had once traversed that countryside or that part of what is today a town or city.

Two possible scenarios for unexpected landowner liability are described in the Centerville Railroad story. The first scenario is

16. Ben L. Kaufman, *Hazardous Materials Shipments Unregulated, Nobody Oversees Even How Much Is Transported,* CIN. ENQUIRER, June 21, 1996, at A05.

17. For example, there are over 1,500 miles of abandoned track (much of which has been dismantled and removed) in New York State alone. *See Branch Mileage Tables*, <http://www.railroad.net/second/> (listing mileage table and stations of railroads that once operated in New York). (This figure does not take into account the number of abandoned railroad sidings throughout New York (and other states).) Much of that land has become overgrown with mature forests or has been reincorporated into farmers' fields, and are no longer physically identifiable as once having been a trackbed.

that of the defoliation of the railroad track. The presence of the defoliant in and around the former roadbed is evidence that would likely demonstrate that the railroad company was the entity that caused the environmental damage, although a claim for some contribution might be raised by the railroad against the manufacturer of the defoliant (unless, of course, as was frequently the case in the pre-environmentally conscious days, the railroad merely utilized petroleum waste product as a defoliant).

The second scenario in the Centerville Railroad story is far more troubling and likely the more common case. The isolated presence of the residuary "gray ooze" is not immediately identifiable as something that the railroad caused to be present along the Raguson siding. The gray material could well have been dropped from a truck or have arrived at the site by other means not involving the railroad. Even if it could be shown that the Centerville Railroad had carried the material to that spot, there are certainly issues as to whether the manufacturer properly revealed to the carrier that it was transporting a hazardous material. The manufacturer of the containers in which the material was being transported might also be liable, if the containers were defectively designed or manufactured. The owner of the boxcar could be held responsible, too, because the boxcar was in a condition that permitted the substance to leak.[18] The Centerville Railroad could be held responsible as the transporter, the Geneva Short Line Railroad could possibly be responsible as the owner of the defective boxcar, and either railroad could possibly also be liable as an arranger for the transportation. The real problem is that, in the absence of evidence that the railroad was the source of the pollution, the law would almost surely impose liability for the clean-up on the present owner of the fee interest in the property.

C. Who Has the Problem?

Under existing laws, the owner of property that is burdened by a railroad easement is primarily responsible for any environmental problems on that property, regardless of the degree of control that

18. Today, tank cars have become the most common railroad car to transport hazardous materials. *See Railroad Tank Cars—The Safe Way to Ship Hazardous Materials, supra* note 7. Most tank cars are owned not by the railroads, but by private investors. *Id.*

owner may have had over that portion of the property burdened by the easement. The whole purpose, of course, of any kind of easement is to give a person who is not the owner of real property the right to assert some degree of control over that property. Depending on the type of railroad easement, the landowner may retain little to *no* control over that property. Railroad easements fall into three categories: (i) service easements, which are those railroad easements that are intended primarily to serve the transportation needs of the owner of the servient property (for example, the Raguson siding); (ii) passage easements, which are railroad easements that provide passage over the servient property to serve the needs of persons other than the owner of the servient property (which would have been the case as to the intervening property owner, if the tracks of the Raguson siding had traversed an easement over property located between the Raguson Warehouse property and the switch); and (iii) combined passage and service easements, which are railroad easements that provide rail service to the owner of the servient property, which rail service continues through the servient property to provide passage and service to servient properties further along the siding (which would have been the case as to Raguson, if the Raguson siding had continued beyond the Raguson Warehouse on to the property of other customers who were served by that siding). In any case, however, the degree of control over the property that is retained by the owner depends upon the extent to which the railroad (by contract or by law) has the right to exclude others (including the property owner) from the easement property and not upon the category of the easement in question. Control should be an important factor in determining liability for the remediation of environmental contamination. At present, this is not necessarily the rule.

While most railroad easements and rights of way were created under written agreements with landowners,[19] most of these agreements predate America's concern for preserving a clean environment and the environmental laws enacted over the past three decades. Consequently, these agreements generally do not contain provisions for dealing with contamination incidents. The

19. Some of the easements were created by condemnation and others by prescription.

question is whether it is fair for a landowner to be burdened with the responsibility (which could be substantial) for environmental remediation and clean-up, when that owner may have had little or no control over the contaminated site and have had no involvement in causing the contamination.

Moreover, the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, known generally by the acronym CERCLA,[20] and other environmental laws allow common carriers defenses against liability as well as mandatory limits on the amount of their monetary liability, but these laws may not afford protection to landowners. To make matters worse for landowners, they may be subject to potential liability not only from claims by government agencies, but also from claims in private actions under the environmental laws and under common law by third parties who are injured or suffer damages, as, for example, where the contamination spreads or leaches into neighboring properties. In instances where the contamination results from an undetected leak and is not discovered until years later, the problem for the landowner is exacerbated.

These problems for landowners are shared by ground lessees, tenants and others who occupy the land or have interests in it. The easement holder, however, usually is not regarded as an owner of property for the purposes of federal and state environmental laws. Thus, the railroad, which in most instances is the likely source (if not the actual cause) of the environmental contamination, gets a "free ride" when it comes to liability, while the landowner pays the "full fare."

III. Strict Environmental Liability of a Landowner

The principal federal statute that requires landowners to report and clean-up hazardous material contamination on their properties is CERCLA, as amended by the Superfund Amendments and Reauthorization Act of 1986, known as SARA.[21] Section 103 of

20. 42 U.S.C. §§ 9601-9675 (1998).

21. Pub. L. No. 99-499, 100 Stat. 1613 (codified in scattered sections of 26 U.S.C. and 42 U.S.C.).

CERCLA[22] requires the reporting of releases of hazardous materials to the National Response Center of the Environmental Protection Agency (the "EPA"), within specified time periods from the discovery of the release. The term "release" is broadly defined under CERCLA to include "spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping"[23] and similar activities. Certainly, the "gray ooze" on the Raguson siding would qualify as a "release" required to be reported when it was discovered. After the report of the release is received, the EPA identifies the persons and entities who will be "principally responsible parties," generally referred to as a "PRP" or the "PRP's," for paying the costs of cleaning up and remediating the release material. If the PRP's do not undertake and complete the remediation voluntarily, the EPA will do so and seek reimbursement for the costs, as well as possibly damages for injury to natural resources.

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22. Section 103(a) of CERCLA states:

> Any person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such vessel or facility in quantities equal to or greater than those determined pursuant to section 9602 of this title [section 103 of CERCLA], immediately notify the National Response Center established under the Clean Water Act [33 U.S.C. § [*sic*] 1251 et seq.] of such release. The National Response Center shall convey the notification expeditiously to all appropriate Government agencies, including the Governor of any affected State.

42 U.S.C. § 9603(a) (1998).

23. As defined in CERCLA,

> [t]he term "release" means any spilling, leaking, pumping, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C. § 2011 et seq.], if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 170 of such Act [42 U.S.C. § 2210], or, for the purposes of section 9604 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under section 7912(a)(1) or 7942(a) of this title, and (D) the normal application of fertilizer.

42 U.S.C. § 9601(22) (1998).

Under Section 107[24] of CERCLA, the owner of the "facility"

24. Section 107 of CERCLA provides:

(a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the National Contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the National Contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by

affected by the release is strictly liable to pay or reimburse the remediation costs, and will be named as one of the PRP's. The term "facility" is used in the statute to refer to the property affected, and is defined to include "any building, structure, installation, . . . site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located."[25] The owner's liability for the costs thus attaches merely by virtue of the owner's status as the owner, and generally is absolute. Liability can be avoided if the landowner can prove, by a preponderance of the evidence, the narrowly construed defenses set out in Section 107 of CERCLA, namely, that the release of the hazardous substance was caused solely by (1) an act of God; (2) an

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a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

(c) Determination of amounts

(1) Except as provided in paragraph (2) of this subsection, the liability under this section of an owner or operator or other responsible person for each release of a hazardous substance or incident involving release of a hazardous substance shall not exceed—

(A) for any vessel, other than an incineration vessel, which carries any hazardous substance as cargo or residue, $300 per gross ton or $5,000,000, whichever is greater;

(B) for any other vessel, other than an incineration vessel, $300 per gross ton, or $500,000, whichever is greater;

(C) for any motor vehicle, aircraft, hazardous liquid pipeline facility (as defined in section 60101(a)(5) of title 49), or rolling stock, $50,000,000 or such lesser amount as the President shall establish by regulation, but in no event less than $5,000,000 (or, for releases of hazardous substances as defined in section 9601-(14)(A) of this title into the navigable waters, $8,000,000). Such regulations shall take into account the size, type, location, storage, and handling capacity and other matters relating to the likelihood of release in each such class and to the economic impact of such limits on each such class[.]

42 U.S.C. § 9607 (1998).

25. Pursuant to CERCLA,

[t]he term "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 U.S.C. § 9601(9) (1998).

act of war; (3) an act or omission of a third party; or (4) a combination of the foregoing.[26]

At first glance, it would seem that a landowner would never be liable for remediation costs of a release on the landowner's property that had been caused by a third party, such as the Centerville Railroad. But the "innocent landowner defense," as this affirmative defense has come to be known, must be proven by the defendant. To qualify for this affirmative defense, the landowner must show that the release was caused "*solely*" by the acts of others. First, the landowner must show that the release was caused by the act or omission of someone *other than* an employee or agent of the defendant, or *other than* "one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with"[27] the landowner. Second, the landowner must show that it exercised due care with respect to the particular hazardous substance concerned in light of all relevant facts and circumstances, and that it "took precautions against foreseeable acts or omissions of any such third party as well as the consequences that could foreseeably result from such acts or omissions."[28]

The first landowners who became PRP's sought to establish the innocent landowner defense by showing that the hazardous condition was caused by or occurred during the earlier ownership of a person or entity further up in the chain of title. However, the EPA took the position that a real estate deed is a contractual relationship which eliminates the third party defense for a PRP in the chain of title with a party who caused or contributed to the release.[29] The EPA's position was confirmed by the SARA amendments to CERCLA, under which the term "contractual relationship" is defined as including, but not being limited to, "land contracts, deeds or other instruments transferring title or possession."[30] An exception from liability is available for a landowner

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26. 42 U.S.C. § 9607(b) (1998).
27. *Id.*
28. *Id.*
29. 42 U.S.C. § 9607(b) (1998); *see* Deborah Banfield, *Comprehensive Environmental Response Compensation and Liability Act: Expansion of Lender Liability*, 20 CAP. U. L. REV. 755 (1991).
30. Under CERCLA,

> [t]he term "contractual relationship", for the purpose of section 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in

who can show two things. First, the landowner must show that it acquired the real property where the facility is located after the disposal or placement of the hazardous substance on, in, or at the facility. Second, the landowner must establish by a preponderance of the evidence that, when it acquired the property, it did not know and had no reason to know that a release of hazardous substance had occurred on the property.[31] But under paragraph (B) of Section 101(35) of CERCLA, in order to show that it "had no reason to know" of the release, the landowner must show that it conducted, in a manner consistent with good commercial or customary practice in an effort to minimize liability, all appropriate inquiry at the time of acquisition into the previous ownership and uses of the property. This paragraph of CERCLA further specifies that, in allowing this defense, the court must take into account "commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection."

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clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:

(i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.

(ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

(iii) The defendant acquired the facility by inheritance or bequest.

In addition to establishing the foregoing, the defendant must establish that he has satisfied the requirements of section 9607(b)(3)(a) and (b) of this title.

(B) To establish that the defendant had no reason to know, as provided in clause (i) of subparagraph (A) of this paragraph, the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

42 U.S.C. § 9601(35) (1998).

31. The landowner may also qualify under certain circumstances if it is a governmental entity or if it inherited the property. *See id.*

Thus, in practice, it is very difficult for a landowner to establish that it qualifies for the innocent landowner defense unless it can show that the property was thoroughly inspected at the time of acquisition by trained specialists and that the property was found to be "clean." Prior to the mid-1980's, landowners often purchased property "as is" without any representations by the seller and usually without any inspections by trained specialists which would probably have disclosed the existence of the hazardous substances on the property. To make matters worse, areas such as current and former railroad sidings and rights of way are inherently suspect as areas likely to contain contamination. In order for an owner of property on which a railroad siding formerly was located to establish an innocent landowner defense, that owner would have had to have conducted extensive testing at the property prior to acquiring it. If contamination were subsequently discovered, the issue would be whether the testing had been adequate to establish the innocent landowner defense. The owner may attempt to seek contribution from the railroad as an easement holder, but the likelihood of success in such an endeavor is questionable.

IV. Environmental Liability of a Easement Holders

Arguably, where an easement way was contaminated with hazardous materials, the holder of the easement could be liable for paying the remediation costs as a PRP under Section 107 of CERCLA. But the statute is not clear on the subject of easements and easement holders. Section 107 of CERCLA makes "the owner or operator of a vessel or facility" a PRP.[32] While the term "owner or operator"[33] is tautologically defined as "any person owning or operating" such facility, the holder of an easement can justifiably say that it is not the owner of a facility. Nonetheless, in American law, easements are recognized as interests in real

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32. 42 U.S.C. § 9607(a)(1) (1998).

33. CERCLA states:

> [t]he term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

42 U.S.C. § 9601(20)(A) (1998).

property, and the holder of an easement is said to own an interest in the property traversed by his easement. Commentators have debated for years now whether easement holders should be treated as PRP's and subjected to paying at least a share of the costs of remediation.[34] The obvious unfairness such strict liability would place on easement holders that did not actually commit the release, such as railroads and utility companies (the most common easement holders), has been noted, but compelling arguments on the other side have been made as well. Particularly where the easement holder has the right to exclude all others, including the property owner, from the easement way (as railroads and utility companies frequently do), the easement holder should be the party primarily responsible for the clean-up costs. In one case presenting a somewhat reversed situation, an easement holder was recognized as a party having the right to sue as plaintiff for reimbursement of remediation costs it incurred in cleaning up contamination caused by acts or omissions of the property owners.[35]

The EPA and other environmental authorities, however, do not seem to know how to treat easement holders. In drafting its rule on the reporting of transfers of federal property, the EPA has not yet decided whether the term "owner" in that rule should include an easement holder, and whether the granting of an easement will be deemed a transfer under that rule.[36] Similarly, under the Michigan Natural Resources and Environmental Protection Act, easement holders are specifically excluded unless it could be proved that the holder did actually cause or contribute to the contamination.[37]

The courts are looking at whether Section 107 of CERCLA requires that the mere existence of a contractual relationship disqualify a person from the defense that a third party caused the contamination. In *United States v. Allied Chemical Corp.*,[38] a case in which a railroad held a right-of-way easement over property

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34. Melissa McConigal, *Extended Liability Under CERCLA: Easement Holders and the Scope of Control*, 87 NW. U. L. REV. 992 (1993); Jill Neiman, *Easement Holder Liability Under CERCLA: The Right Way to Deal With Right-of-Way*, 89 MICH. L. REV. 1233 (1991); E.P. Whitener, *Cleaning Up the Confusion: Long Beach, Grand Trunk, and the Scope of Easement Holder Liability Under CERCLA*, 45 EMORY L.J. 805 (1996).

35. National R.R. Passenger Corp. v. New York City Hous. Auth., 819 F. Supp. 1271, 1280-81 (S.D.N.Y. 1993).

36. 40 C.F.R. § 373 (1990).

37. MICH. COMP. LAWS ANN. §§ 324.20101(2), 324.20126(3) (West 1998).

38. United States v. Allied Chem. Corp., 587 F. Supp. 1205, 1206 (N.D. Cal. 1984).

which became contaminated by the property owner, the court focused on the nature of the easement "contract" held by the railroad to determine whether the contaminating acts of the third party (*i.e.*, the property owner) were performed in connection with the contract. In that case, the railroad was relieved of any liability because the contaminating acts were not related to the easement agreement. The logic of this case seems to undercut the fundamental notion that privity of contract should blindly be a predicate for denying the innocent landowner defense to the owner of the property. Logically, in the vast majority of cases, the contract pursuant to which the landowner acquired the property would not have involved a situation in which the contaminating acts were related to the contract to acquire the property. Unfortunately, CERCLA mandates that land contracts and deeds be considered within the phrase "contractual relationship," and the logical result does not factor into the equation.

Several courts have considered whether the holder of an easement should be treated as a PRP under CERCLA, where an easement contains a contaminated area, and whether the landowner could look to the easement holder for contribution to the payment of remediation costs. These courts have all excused "innocent" (that is, having nothing to do with the contamination) easement holders from liability for remediation costs as having too tenuous a relationship to the contaminated facility.[39] At least one court seems to have held that an innocent easement holder simply should not be treated as an owner.[40] Thus, a landowner is not likely to be able to shift any payment of remediation costs to an easement holder, such as a railroad with a right-of-way or siding agreement, unless the landowner is able to prove that the easement holder actually committed or contributed to the release.

V. Additional Factors in Determining Environmental Liability of a Railroad as an Easement Holder

There are some aspects of railroad rights-of-way easements and siding agreements that distinguish them from other easements, and may sometimes affect how they are or should be treated under

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39. Acme Printing Ink Co. v. Menard, Inc., 870 F. Supp. 1465, 1483 (E.D. Wis. 1994); Grand Trunk W. R.R. v. Acme Belt Recoating, Inc., 859 F. Supp. 1125, 1130 (W.D. Mich. 1994).

40. Long Beach Unified Sch. Dist. v. Dorothy B. Godwin California Living Trust, 32 F.3d 1364, 1367 (9th Cir. 1994); *see also* Grand Trunk W. R.R., 859 F. Supp. at 1130.

environmental law.

A. Easements Generally

Two principal categories of easements are recognized in American law: easements *appurtenant* and easements *in gross*.[41] Easements appurtenant are easements made for the benefit of, or as an incident to, a particular piece of land, referred to as the *dominant* parcel. The parcel of land burdened with the easement is referred to as the *servient* parcel.

Railroad easements are rarely made in the form of an easement appurtenant. Instead, they are made as an easement in gross, that is, a right to use a parcel of land without the use being related to any other parcel of land in particular.[42] Early in American law, easements in gross were not recognized as a type of easement, but were treated as licenses to use a parcel of land.[43] This distinction arose from the need for the principles of law to have a basis on which an easement over a servient parcel could

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41. 25 AM. JUR. 2D *Easements* § 7 (1996).

42. One authority describes the easement in gross as follows:

> The easement in gross is a mere personal right to use another's land; it is not supported by a dominant estate, does not arise out of the ownership of property, and does not run with the land.
>
> The important easement in gross is the commercial easement in gross, which is assignable and can be both conveyed and inherited. An easement in gross, [*sic*] was, in the past, frequently used for railroad rights of way, pipelines and electric and telephone lines. . . . [I]t is not unusual to find . . . a grant of commercial easement in gross in such terms as "the right to install electric power lines over, under, or through any and all property which I presently own . . . ."
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> Railroad rights of way . . . were often created by deeds that are so ambiguous that it is sometimes difficult to tell whether the intention was to convey a fee interest or an easement.

ALVIN L. ARNOLD & JACK KUSNET, THE ARNOLD ENCYCLOPEDIA OF REAL ESTATE, at 253-54 (1978).

43. Miller v. Lutheran Conference & Camp Ass'n, 331 Pa. 241, 245, 200 A.2d 646, 649 (1983); Akers v. Baril, 300 Mich. 619, 623, 2 N.W.2d 791, 793 (1942). The issue of what can "run with the land" as a property right relates back so far in time that it troubled courts in the sixteenth century. *See* Spencer's Case, 5 Co. 16a, 77 Eng. Rep. 72 (K.B. 1583). In *Neponsit Property Owners' Ass'n Inc. v. Emigrant Indus. Savs. Bank*, 278 N.Y. 248, 15 N.E.2d. 793 (1938), Judge Lehman, in speaking of privity of estate as a legal requisite for covenants running with the land, stated that a covenant, which contained a provision to the effect that the covenant ran with the land, might not do so if it failed to satisfy the legal requirements that it touch or concern the land and that it be based on privity of estate. *Id.* at 254-55, 15 N.E.2d at 795; *see* Morgan Lake Co. v. New York, N.H. & H. R.R., 262 N.Y. 234, 238, 186 N.E. 685, 686 (1933); Maryland & P. R.R. v. Silver, 110 Md. 510, 73 A. 297, 300 (1909).

continue for the benefit of the dominant parcel, regardless of who became the owner of the dominant parcel from time to time. That basis was grounded on deeming the easement to be an estate or interest in the land of the servient parcel, which in turn required that the easement be related to and "run with" the ownership of a dominant parcel of land.[44] Thus, if the right to use a parcel of land were given to someone without such use being related to any particular parcel of land, that is, without a dominant parcel, such right of use would be personal to the grantee and incapable of "running with the land"—and therefore it could not be an easement. This reasoning, akin to making a square easement fit into a round legal theory, led to awkward statements such as: "[An easement] is an incorporeal hereditament which issues from a corporeal estate for the benefit of another estate. It is a burden imposed upon corporeal property and not upon the owner thereof. It is in the nature of an estate and is an appurtenance to an estate."[45]

Today, and for some time now in American law, easements in gross are and have been recognized as a type of easement, notwithstanding the fact that such easements are not appurtenant to a dominant parcel.[46] Railroad and utility company right-of-way easements are usually treated as easements in gross, because the easements do not benefit any particular piece of property owned by the railroad (or the utility company). Rather, the easements just allow the railroad (or the utility company) to use the servient parcel. Indeed, often the servient parcel is used for the purpose of providing railroad or utility service to the servient parcel, as well as to others.

Some commentators have said that railroad easements have a special character, and that often it is not clear whether the agreement is just an easement or actually a grant of ownership to the land involved:

> A railroad right-of-way may be called an easement, but it is so different from most easements that it is almost unrecognizable as such. A railroad right-of-way is more than a mere right of passage and more than an easement; in substance, it is an

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44. *See* Akers, 300 Mich. at 623, 2 N.W.2d at 791; Wright v. Best, 19 Cal. 2d 368, 380, 121 P.2d 702, 710 (1942).

45. WARREN'S WEED, NEW YORK REAL PROPERTY, *Easements* § 1.01, at Ease-7 (1992).

46. Hise v. Barc Elect. Coop., 492 S.E.2d 154, 157 (Va. 1997); Allendorf v. Daily, 6 Ill. 2d 577, 587, 129 N.E.2d 673, 679 (1955).

> interest in land "special and exclusive in nature." The railway company may even erect, or permit others to erect, stations or warehouses on the right of way when they are "accessory" to the operation of trains.[47]

One commentator has even said that a railroad has a right to bring an action for ejectment with respect to property over which it holds only a right-of-way easement.[48] Be this as it may, railroad right-of-way easements and siding agreements are recognized in American law as easements or interests that, like easements appurtenant, run with the land and are binding on subsequent owners of the servient parcel—and, for purposes of environmental law, railroad easements and siding agreements should be treated like other easements.

B. Written Agreements

Easements in gross are almost always created by written agreement between the owner of the servient parcel and the person to whom the easement is granted. Railroad right-of-way easements and siding agreements are no exception. America's land records contain hundreds of thousands (if not millions) of written railroad right-of-way easements and siding agreements, many dating back decades, and some to the 1800's. Usually these written agreements set forth the rights and duties of the parties, including the duties relating to maintenance and repair of the easement way. As with easements appurtenant, when the written agreement does not cover a specific incident, the courts will strive to interpret the intentions of the parties to determine the duties to be performed. Generally, when the written agreement is silent on the duty to maintain and repair, the courts have held that the easement holder has the duty to maintain and repair the easement way, and the owner of the servient parcel does not.[49] But this general rule has not yet been held to extend to protect the landowner in the case of environmental damage to the property.

The principal problem, in a context such as the second Centerville scenario of a railroad right-of-way or siding on which hazardous materials have been spilled, is that most railroad easement agreements pre-date America's concern to maintain a

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47. JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND ¶ 1.06, at 1-52 n.79 (1988) (quoting G. Pindar, *Real Property*, 33 MERCER L. REV. 219, 226 (1981) (omitting citations)).

48. BRUCE & ELY, *supra* note 47, ¶ 1.06, at 1-52 n.79 (citing authorities).

49. *See, e.g.,* New York C. R.R. v. Yarian, 219 Ind. 477, 39 N.E.2d. 604 (1942); *see also* 25 AM. JUR 2D *Easements* § 94 (1996).

clean environment and pre-date the passage of America's environmental laws. For that reason, most railroad easement agreements do not contain any specific provisions for safeguarding against spills and releases of hazardous materials or for the clean-up responsibilities when a spill or release has occurred. An owner of a servient parcel on which a spill or release has occurred will find that owner can be declared liable under CERCLA to remediate the spill or release simply because it is the owner of the contaminated parcel. But when that owner turns to the written easement agreement, particularly if it is an old one, the owner will likely also find that there are no provisions anticipating such an event under which the railroad could be declared responsible for the clean-up or the costs of the clean-up, although the agreement does not preclude an innocent landowner from seeking damages under a tort theory if the landowner can establish in court that the easement holder actually caused the environmental harm. Modern easement agreements generally will specify how the responsibility for clean-up and costs of clean-up will be allocated as between the landowner and the easement holder.[50]

Where a landowner can prove that an easement holder, as a "third party," actually caused or contributed to a "release" prior to the time that the landowner acquired the property, the landowner may be able to qualify for the innocent landowner defense if the landowner undertook appropriate inquiries and investigations to determine whether any contamination existed on the property and satisfied the other conditions to being an "innocent landowner."[51] As a result of the SARA amendments to CERCLA, the mere existence of the easement "contract" (which logically ought to come within the term "contractual relationship" as falling within the phrase "contracts, deeds or other instruments transferring title or possession") should not be a bar to the landowner's ability to establish the innocent landowner defense because the easement

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50. It should be noted that in one case, in which parties to an easement agreement have tried to include in the written agreement a provision releasing the easement holder from liability for environmental obligations, that provision was held void as contrary to public policy. However, the easement involved in that case was a pipeline easement, not a railroad right-of-way easement. Branch v. Mobil Oil Corp., 772 F. Supp. 570, 571-73 (W.D. Okla. 1991).

51. Where a landowner can prove that an easement holder actually caused or contributed to a release after the landowner acquired the property, the landowner would have to be able to prove that the landowner had taken all reasonable steps to require the easement holder to comply with all environmental laws in order for the landowner to be an "innocent landowner."

contract is not treated as a "contract" for SARA or CERCLA purposes. However, presumably one of the items to be reviewed if the landowner is to qualify to be an innocent landowner would be the easement agreement itself, either the terms of which or just the existence of which might give rise to the need for further investigation on the property to determine that the property is "clean."

C. Termination of Easement

Railroad right-of-way easements and siding agreements, like other easements, can be terminated by written agreement, but often the tracks, switches and other equipment are simply removed by the railroad, as they were in the Centerville story, without any written confirmation of termination. In these cases, a court would most likely declare the easements to have been terminated by an express action signifying the railroad's intention to abandon the easement and an agreement by implication to its termination.[52] If the landowner does not object to such a termination, a railroad might argue that the owner's silence was an implied release of any further liability or obligation to the landowner with respect to the easement or the area covered by it (under the general principle that the easement holder has the burden of maintaining the easement area (although that principle has not yet been applied to environmental contamination)), and thus preclude a landowner from recovering any part of clean-up costs from the railroad (except of course where the evidence establishes that the railroad caused the contamination).

D. Railroad Bankruptcies

As a final factor distinguishing railroad easements from other easements, the railroad business is a difficult one and over the years many railroads have gone through bankruptcy proceedings. As a practical matter, liability for any damage with respect to these right-of-way easements and siding agreements may have been discharged in the bankruptcy proceeding, or there may simply be no successor railroad that has taken over the business and the easements. In either case, there would no one to whom the landowner could look for payment of any clean-up costs.

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52. *See, e.g.*, Hickerson v. Bender, 500 N.W.2d 169, 171 (Minn. 1993); United Parking Stations, Inc. v. Calvary Temple, 257 Minn. 273, 278, 101 N.W.2d 208, 211 (1960); *see also* 25 AM. JUR 2D *Easements* § 113 (1996).

VI. Environmental Liability of a Railroad as a Transporter

Although a landowner may not be able to impose any strict liability on a railroad as an easement holder, through which the landowner could seek reimbursement or contribution for the payment of clean-up costs, the railroad and others may have such obligations under CERCLA as a transporter of hazardous materials. While myriad federal, state and local laws, ordinances and regulations apply to the transportation of hazardous materials, this discussion will focus on the principal applicable federal laws, which include the Hazardous Materials Transportation Act as amended by the Hazardous Materials Transportation Uniform Safety Act of 1990 (collectively, "HMTA");[53] the Resource Conservation and Recovery Act ("RCRA");[54] and CERCLA.[55] The DOT implements and enforces the HMTA, while the EPA implements and enforces RCRA and CERCLA.

Under the HMTA, the DOT has promulgated regulations aimed at ensuring the safe transportation of hazardous materials.[56] These regulations cover such items as registration of transporters, training of personnel who will handle the transportation, reporting requirements, packaging specifications, package labeling, container manufacturing specifications, container marking, shipping documentation, and emergency responses. Many of the regulations deal specifically with the transport of hazardous materials by rail.[57]

Under RCRA, the EPA focuses on monitoring and tracking the movement of hazardous materials, to ensure the delivery of the materials to their intended destination. Regulations promulgated under RCRA require registration by transporters[58] and the issuance of an EPA identification number.[59] Transporters must also file a notice identifying their transportation activity and the types of materials they will carry.[60] The principal mechanism employed under RCRA to monitor the shipment of hazardous materials is the requirement that a manifest be issued for each

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53. 49 U.S.C. §§ 5101 *et seq.* (1998).
54. 42 U.S.C. §§ 6901 *et seq.* (1998).
55. 42 U.S.C. §§ 9601-9675 (1998).
56. 49 C.F.R. §§ 171-180 (1998).
57. 49 C.F.R. § 179 (1997); *see also Railroad Tank Cars—The Safe Way to Ship Hazardous Materials, supra* note 8 (discussing regulations for specifications of tank cars).
58. 40 C.F.R. § 263.11 (1997).
59. *Id.*
60. 42 U.S.C. § 6930 (1998).

shipment and signed by each party who handles the shipment until it is delivered, with the further requirement that each party maintain records of the manifests that it signs.

CERCLA, of course, is implemented and enforced by the EPA as the basic federal statute governing liability for releases of hazardous materials into the environment. CERCLA liability for the clean-up of releases and spills of hazardous materials is imposed on transporters by the inclusion of rolling stock as a "facility"[61] under Section 107, of which the transporter is the "owner or operator." Additionally, under Section 101(20)(B) of CERCLA, in the case of a hazardous substance which has been accepted for transportation by a common carrier, the term "owner or operator" means such common carrier or other *bona fide* for-hire carrier acting as an independent contractor.[62] A "release," as previously noted, is broadly defined to include any discharge into the environment.[63]

The DOT and the EPA have tried to coordinate the implementation and enforcement of these statutes by inter-agency memoranda and understandings.[64] The use of overlapping definitions of the term "hazardous materials" in these statutes has resulted in the likelihood that any material that is covered by one of the statutes will be covered by the others.[65]

When a release or discharge of a hazardous material occurs during transport, under regulations promulgated under RCRA the transporter is required to "take appropriate immediate action to

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61. 42 U.S.C. § 9601(9) (1998).

62. Section 101(20) of CERCLA provides:

> In the case of a hazardous substance which has been accepted for transportation by a common or contract carrier and except as provided in section 9607(a)(3) or (4) of this title, (i) the term "owner or operator" shall mean such common carrier or other bona fide for hire carrier acting as an independent contractor during such transportation, (ii) the shipper of such hazardous substance shall not be considered to have caused or contributed to any release during such transportation which resulted solely from circumstance or conditions beyond his control.

42 U.S.C. § 9601(20)(B) (1998).

63. *See* 42 U.S.C. § 9601(22) (1998).

64. 45 Fed. Reg. 51,645 (1980).

65. Section 101(14) of CERCLA specifies that all "hazardous wastes" as defined under RCRA are included as "hazardous substances" under CERCLA. 42 U.S.C. § 9601(14) (1998). Section 306 of CERCLA specifies that each "hazardous substance" as defined under CERCLA shall be deemed to be a "hazardous material" under HMTA. 42 U.S.C. § 9656 (1998).

protect human health and the environment."[66] The transporter also must clean-up the discharge and take any further notifications and actions that may be required by federal, state or local officials to deal with the hazard.

After a transporter cleans up a discharge or release of hazardous materials, under CERCLA, the transporter may seek reimbursement or contribution for the costs from other parties responsible, in whole or in part, for the discharge. Such parties may include third parties responsible for the incident, such as, among others, persons whose vehicles were hit because they failed to get off a crossing, thus causing the accident that resulted in the discharge. Other third parties may include the manufacturer or owner of the rail car in which the hazardous material was traveling, on the theory that had the car been better manufactured and/or maintained, it would have survived any accident intact and not allowed any hazardous substance to be discharged. Third parties may also include the manufacturer of the hazardous substance, for not properly labelling the materials to alert others of the dangers, and the shipper of the product who failed to select the appropriate car for the product or who misloaded the car.

There are some other provisions of CERCLA applicable to transporters, however, which may affect the ability of a landowner to seek payment from a transporter who has caused a release on the right-of-way easement or siding area. For example, under Section 107(b)(3),[67] a shipper will have a defense to liability if it ships materials or wares with a common carrier by rail under a published tariff and acceptance, and the shipper has no other relationship to the release of the hazardous substance. In that situation, the contract with the carrier will not be a bar to the shipper's defense that the release was caused by a third party, and a landowner on whose property the release occurred would not be able, at least under CERCLA, to collect payment of the remedial costs from the shipper.

Under Section 306 of CERCLA,[68] a transporter will be

66. 49 C.F.R. §§ 171.15, 171.16 (1997); 40 C.F.R. §§ 263.30, 263.31 (1997).
67. 42 U.S.C. § 9607(b)(3) (1998).
68. Section 306 states:

> (a) Each hazardous substance which is listed or designated as provided in section 9601(14) of this title shall, within 30 days after October 17, 1986, or at the time of such listing or designation, whichever is later, be listed and regulated as a hazardous material under the Hazardous Materials Transportation Act [49 U.S.C. § 1801 et seq.].

excused from liability under CERCLA, but not other laws, for the release of hazardous materials which were not officially listed as hazardous materials at the time the transportation began. The danger to a landowner in such a situation, of course, is that the landowner might not be able to collect the remedial costs from the transporter under other laws, and, as the owner of the contaminated property, the landowner alone will be liable for the costs. The landowner has no analogous defense that a substance was not officially listed as a hazardous material when the landowner purchased the property containing that material.

Lastly, under paragraph (c) of Section 107 of CERCLA, the liability of a "rolling stock" transporter for the costs of clean-up of a release is limited to $50,000,000 "or such lesser amount as the President shall establish by regulation, but in no event less than $5,000,000."[69] Thus, in the case of a significant release, the landowner may not be able to collect sufficient remedial costs from the railroad transporter even when the railroad is held to be a PRP.

VII. Landowner's Right to Contribution from Easement Holder

There are two principal provisions of CERCLA under which a landowner may seek reimbursement or contribution from a railroad that is found responsible in whole or in part for a release of hazardous materials on the landowner's property: Section 107[70] and Section 113.[71] Many commentators have written about the

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> (b) A common or contract carrier shall be liable under the other law in lieu of section 9607 of this title for damages or remedial action resulting from the release of a hazardous substance during the course of transportation which commenced prior to the effective date of the listing and regulation of such substance as a hazardous material under the Hazardous Materials Transportation Act [49 App. U.S.C. § 1801 et seq.], or for substances listed pursuant to subsection (a) of this section, prior to the effective date of such listing: *Provided, however,* That this subsection shall not apply where such a carrier can demonstrate that he did not have actual knowledge of the identity or nature of the substance released.

42 U.S.C. § 9656 (1998).

69. 42 U.S.C. § 9607 (1998).

70. *See id.*

71. Section 113 of CERCLA provides:

> (1) Contribution
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> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate

differences between these two Sections as to the burden of proof and other issues,[72] but a general discussion of these Sections is beyond the scope of this article. Under both of these Sections, the landowner must prove that the railroad should be held responsible as a PRP covered under Section 107 of CERCLA—that is, as a current owner or operator of the facility, as the owner or operator of the facility at the time of the release, or as an arranger for the disposal or treatment of the released material—or as a transporter who selects the disposal site (the other category of person covered under Section 107). However, the "selection of the site" provision is of no help in the case of an accidental spill in transit to the site,[73] such as in the case of the second Centerville hypothetical in

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response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

(2) Settlement

A person who resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any other of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

42 U.S.C. § 9613(f) (1998); *see* 42 U.S.C. § 9607 (1998).

72. Steven Ferry, *Allocation and Uncertainty in the Age of Superfund: A Critique of Redistribution of CERCLA Liability*, 3 N.Y.U. ENVTL. L.J. 36 (1994); Lisa Goodheart & Karen McQuire, *Revisiting the Issue of Causation in CERCLA Contribution Litigation*, 82 MASS. L. REV. 315 (1998); Daniel Riesel & Michael Bogin, *Allocation of Orphan Shares and Other Private Party CERCLA Vagaries*, SC56 ALI-ABA 81 (1998).

73. It should be noted that special provisions of CERCLA apply to obligate transporters to pay for clean-ups when the land contaminated is the site to which the hazardous materials were delivered and the transporter selected the site. *See*

which the "release" of the gray ooze occurred during transport, not at the intended destination site. In such a case, in which the release occurred many years ago and there is virtually not a scintilla of evidence left as to how the release occurred, the required proof may not be easy to establish. The only potential argument, a *res ipsa loquitur* tort theory based upon the location of the material, presents a weak case because it is impossible to determine that the material was released at a time when the railroad right-of-way was in use by the railroad. The material might have been deposited before or after the railroad ceased to use the right-of-way by a "midnight dumper," who sought to "cover his tracks" by dumping in the area formerly covered by the tracks—the railroad tracks, that is. Unfortunately, CERCLA does not provide for a determination of liability on tort standards. CERCLA works only on principles of strict liability—either a person or entity falls within the classifications of persons and entities having a status for liability, or such person or entity does not.

In the Centerville Railroad story, the landowner clearly falls within one of the Section 107 classifications as the current owner of the property, but he cannot actually show that the hazardous material was released onto his property during the transport by the Centerville Railroad. That is, he cannot show for purposes of Section 107 that the Centerville Railroad was the transporter of a rolling stock "facility" from which the hazardous material was released, or that the Geneva Short Line Railroad was the owner of that rolling stock "facility," or that either was otherwise responsible for the contamination, and his *res ipsa loquitur* claim is unlikely to be accepted by the court as the basis for either a Section 107 claim or a Section 113 claim. Indeed, many courts have held that only a person who qualifies for the innocent landowner defense may bring a Section 107 claim,[74] but in many cases the landowner will not qualify as an innocent landowner because it purchased the property "as is" without what is now determined to be proper investigation (notwithstanding the fact that the investigation undertaken at the time of the acquisition might have been perfectly proper for that time). In the Centerville case, the landowner's position would be enhanced if the EPA were to name the Centerville Railroad as a PRP, but there is no current basis to impel the EPA to do so. The

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42 U.S.C. § 9607(a)(4) (1998). But that is not the Centerville problem.

74. *See, e.g.*, New Castle County v. Halliburton Nus. Corp., 111 F.3d 1116, 1120 (3d Cir. 1998); Rumpke of Ind., Inc., v. Cummins Engine Co., 107 F.3d 1235, 1240-41 (7th Cir. 1997).

landowner may take some ironic solace from the notion that, if the landowner were able to convince a court that the Centerville Railroad should be held liable as a PRP, the railroad (if the shipper or the boxcar manufacturer or some other third party had truly caused the release and the railroad were truly innocent) probably would not be able to make a proper case against any of such parties. Therefore, the railroad would just as unfairly be made to pay the remediation costs.

Assuming that the landowner in the Centerville case can prove that the railroad easement holder is a PRP, it is not certain that the entire amount of the remedial costs would be allocated to the railroad. The courts have sought to develop federal common law as a standard for the determination of allocation of the clean-up costs.[75] Section 113(f)(1) of CERCLA[76] states that federal law is to govern claims made under that Section and requires the courts to allocate the costs of remediation among liable parties using such equitable factors as the court determines are appropriate. The courts have generally followed the same notions for allocation of costs under Section 107 claims.[77] In 1985, then-Senator Gore proposed an amendment to CERCLA which would have listed a number of specific factors on which the courts could base the apportionment of responsibility among PRP's.[78] While the amendment was not enacted, many courts have made some use of the so-called "Gore Factors."[79] However, these factors, too, are not based on principles of tort law and simply list general considerations designed to help the courts make an equitable determination. Some courts have followed the Uniform Contribution Among Tortfeasors Act[80] and the Uniform Comparative Fault Act[81] as models in allocating contribution obligations,[82] but there is no

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75. *See* Ferry, *supra* note 72, at 41; Goodheart & McQuire, *supra* note 72; Riesel & Bogin, *supra* note 72, at 98-101.

76. 42 U.S.C. § 9613(f) (1998).

77. *See* Ferry, *supra* note 72, at 41; Goodheart & McQuire, *supra* note 72, at 319-20; Riesel & Bogin, *supra* note 72, at 101-06.

78. H.R. 253, 99th Cong., 1st Sess. § 19 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 3042.

79. *See, e.g.*, United States v. Marisol, Inc. 725 F. Supp. 833, 841-42 (M.D. Pa. 1989); United States v. A & F Materials Co., 578 F. Supp. 1249, 1256-57 (S.D. Ill. 1984). *But see* United States v. Wester Processing Co., 734 F. Supp. 930, 937-38 (W.D. Wash. 1990).

80. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. 57 (1993).

81. UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. 43 (1993).

82. United States v. Gencorp. Inc., 935 F. Supp. 928, 932 (N.D. Ohio 1996); United States v. SCA Servs. of Ind., Inc., No. 1:89cv29, 1995 WL 569634 (N.D. Ind. 1995).

mandate to do so. Probably the best way to describe the current *modus operandi* of the courts for allocating remedial costs is to say that they operate on the basis of relative culpability or relative degree of fault.[83] Thus, in the Centerville case, even if the railroad were added as a PRP, the landowner probably would be required to bear some allocation of the costs for purchasing the property "as is," without properly investigating the property for contamination.

Thus, the landowner will not succeed in a claim for contribution or payment from the Centerville Railroad for the contamination of his property under the principal federal law for environmental claims, CERCLA. The landowner is left to do the best he can by other means, such as other environmental laws or common-law theories, which are "second-choice" options because such laws were not enacted, nor were such common law theories designed, principally for environmental contribution cases.

VIII. The *De Minimis* Settlement Option

Section 122(g)(1) of CERCLA[84] allows the EPA to settle with

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83. Environmental Transp. Sys. Inc. v. ENSCO, Inc., 763 F. Supp. 384, 388 (C.D. Ill. 1991), *aff'd*, 969 F.2d 503 (7th Cir. 1992); *see also* Ferry, *supra* note 72, at 41; Goodheart & McQuire, *supra* note 72, at 319-20; Riesel & Bogin, *supra* note 72, at 101-06.

84. Section 122(g)(1) states:

> Whenever practicable and in the public interest, as determined by the President, the President shall as promptly as possible reach a final settlement with a potentially responsible party in an administrative or civil action under section 9606 or 9607 of this title if such settlement involves only a minor portion of the response costs at the facility concerned and, in the judgment of the President, the conditions in either of the following subparagraph (A) or (B) are met:
>
> (A) Both of the following are minimal in comparison to other hazardous substances at the facility:
>
> (i) The amount of the hazardous substances contributed by that party to the facility.
>
> (ii) The toxic or other hazardous effects of the substances contributed by that party to the facility.
>
> (B) The potentially responsible party—
>
> (i) is the owner of the real property on or in which the facility is located;
>
> (ii) did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility; and
>
> (iii) did not contribute to the release or threat of release of a hazardous substance at the facility through any action or omission.

"*de minimis* owners" of property on which a release has occurred. That Section requires that both the amount of the hazardous substances contributed by that party be minimal and that the toxic or other hazardous effects of the substances contributed by that party be minimal. The Section was added to CERCLA by the SARA amendments when Congress realized the undue hardship that the strict liability scheme of CERCLA was placing on innocent landowners who were minimally related to the contamination—such as landowners who were the victims of "midnight dumpers." Unfortunately, this Section provides that it is available only if a release from liability is sought only for "a minor portion of the response costs," which is determined by the EPA on a case-by-case basis. Additionally, the EPA has interpreted a provision of this Section, which states that it is not available if the PRP purchased the property with actual or constructive knowledge that the property was used for the generation, transportation storage, treatment or disposal of any hazardous substance, to mean that a settlement under this Section is available only to a landowner who qualifies for the innocent landowner defense.[85] The EPA continues to hold this position despite criticism from at least one commentator.[86]

In the Centerville scenario, the landowner, not qualifying as an innocent landowner and seeking to be relieved of the full amount of the response costs, would most likely not be accepted by the EPA for a *de minimis* settlement under Section 122 of CERCLA.

IX. Conclusion

In Centerville-like cases, under current law the landowner will be stuck paying for the remediation of a contamination which occurred years before it purchased the property. The railroad would not be liable as a PRP merely because it was an easement holder with respect to the property, as the tendency of the courts

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> This subparagraph (B) does not apply if the potentially responsible party purchased the real property with actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.

42 U.S.C § 9622(g) (1998). Note that this section governs settlements with both "*de minimis* landowners" and "*de minimis* contributors" who are not necessarily landowners.

85. Environmental Protection Agency Notice, 54 Fed. Reg. 34,235 (1989).

86. J. Newton, *The Innocent Too Shall Pay: EPA's Settlement Policy Under CERCLA For De Minimis Landowner Liability*, 51 U. PITT. L. REV. 727 (1990).

has been to excuse easement holders unless it can be proved that they actively contributed to the release. Likewise, in Centerville-like cases, it is highly doubtful that any *res ipsa loquitur* case will be accepted as a grounds for imposing strict liability on the railroad as the transporter at the time of the release. It is also unlikely that a Centerville-type landowner could qualify for a *de minimis* settlement, given the current position of the EPA. Nevertheless, there are many landowners in America in the Centerville dilemma, landowners who long ago purchased properties with contaminated railroad right-of-way easements and sidings without what subsequently became proper inspections. Yet, these are landowners who made their purchases under what were perfectly acceptable standards of investigation common to the period when they acquired the properties, and who are otherwise innocent of the pollution, or who are in similar situations with contaminated areas from railroad easements. The question remains: Does it really serve the nation's environmental purposes to leave these landowners in this helpless situation? In addition to landowners, what of ground lessees, occupancy tenants, licensees and other users of the property, whose property rights and interests may also be subject to easements?

It would appear that the unfairness of the landowner's plight should provide motive for a re-evaluation of our strict liability policy. Certainly, the owner of the property is the beneficiary of the clean-up of that owner's property. However, if that landowner paid the full market value purchase price to acquire the property, the "benefit" becomes meaningless if the faultless landowner is compelled to pay a fortune to remediate the contamination, thereby doing no more than restoring the property to the value that the landowner thought it had in the first place. A landowner should not be responsible simply by virtue of having purchased a piece of property burdened with contaminants at a time when America's public policy did not require the landowner to undertake any environmental investigation. Such landowners did nothing wrong. They simply suffered the misfortune of being the landowners when the social policy *du jour* elected them as the hapless persons required to pay for the clean-up.[87] And most certainly, if as a matter of social policy we should continue to believe that the landowner is to be held liable, the legal fiction of "negligent

87. While the landowner may have the right to seek recompense from its seller, a discussion of such rights and the problems in enforcing them is beyond the scope of this article.

acquisition" should be abandoned as a rationale for those who acquired their property interests prior to the adoption of our environmental law. Likewise, the owner of property burdened by an easement, which property did not contain hazardous substances at the time the landowner purchased the property, should not automatically become liable for clean-up costs if a portion of the property burdened by the railroad easement becomes contaminated *after* the acquisition of the property (albeit under circumstances where there is not a sufficient baseline to establish *when* the contamination occurred).

The results should not depend upon whether the easement in question is a service easement, a passage easement or both. In any case, the railroad has acquired rights over the landowner's property. The Raguson siding served no customer other than Raguson, yet it was and still is common practice for railroads to store freight cars not related to the customer on the customer's sidings.

The issue of control is far more relevant. In some (albeit few) instances, customer's properties are highly controlled. Some are protected by substantial fences and rail cars are admitted to the property by the customer unlocking a fence gate. But even that level of security and degree of control would not protect the landowner against the Centerville-type of leakage contamination. The analysis would be quite different if the only rail cars admitted to the customer's property were cars exclusively serving the customer. In most cases, however, control over the property burdened by the easement is shared equally by the railroad and the landowner, and in many cases it is the railroad that exercises primary dominion and control over the easement areas. In those cases, both on a control theory as well as a "benefit" theory, the railroad should bear some or all of the burden of unallocable contamination.

The landowner should be provided with a defense and concomitantly the railroad should face exposure if the following facts appear:

1. The railroad has the right to or actually does exercise dominion and control over the easement area.
2. The contaminant discovered on the property is not one endemic to the current use of the property or to any prior known use of the property.
3. The identity of the true polluter is unknown.

We recognize that this recommendation, if implemented, would impose a financial burden on a railroad industry that has for many

years experienced difficult economic times. However, pinning the requirement to foot the bill for the remediation upon the "more likely responsible party" would seem to be a fairer result than blindly mandating that the landowner pay. Even a sharing of the burden by both the landowner and the railroad would be a fairer result, since they both have a very real interest in the real estate and particularly when both have dominion and control over the easement area on the property. As a legal principle, easements are as much property rights as are leases and fee interests. The degree of control granted to the holder of a lease, the owner of a fee or the holder of an easement could be total (although obviously, not simultaneous). The notion that the owners of a fee interest, the holders of a leasehold estate, the holders of an easement and the holders of a license should be treated differently for environmental purposes simply based upon the nature of the right that they hold seems inappropriate, albeit simplistic. The issue of environmental liability should be resolved on the basis of control of the property combined with probability of responsibility. To ignore the issue and to leave the burden upon the landowner is an unfair result which threatens to burden hundreds of thousands of innocent people throughout our country. A sense of fairness requires that we re-examine these results. This concept should not be limited exclusively to railroad easements. The principle should apply as well to other types of easements where the easement holder exercises dominion and control, and is the exclusive holder of the easement rights in question.

The current state of the law should not be the end of the legal story. It certainly is not the end of the Centerville story:

Tom Heckman continued to run yard engines for slightly more than two years after that October day when he and Mike Loury defoliated the Raguson siding. He then retired from the Centerville Railroad and within a few months thereafter he died, only three days short of his 63rd birthday. The combination of engine smoke plus three packs of Lucky Strikes each day had taken their toll. When the Centerville Railroad's business started to decline, Mike Loury was laid off. Folks around Centerville say that he hooked up with a railroad in the western part of Pennsylvania and he later moved out toward Chicago. After that, people in Centerville simply lost contact with him.

Although Jim Mays and John Munster were unaware of the leak at the Raguson siding, subsequently Munster made a deeply disturbing discovery about something that the Railroad had been hauling. He and Jim Mays discussed the matter on a couple of

occasions. A few weeks after their third conversation about his strange discovery, John Munster died in an automobile accident, when late one Friday night his car went off a two-lane road and rolled over in a ditch. Jim Mays also died in an automobile accident a month and a half later when his car left the road and hit a tree as he was driving to work one morning. No one connected the two incidents other than by the unfortunate coincidence of the two deaths until a few years later, when someone else started looking into things that the Centerville Railroad had been hauling. But that is another story for another time.