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New South (review)

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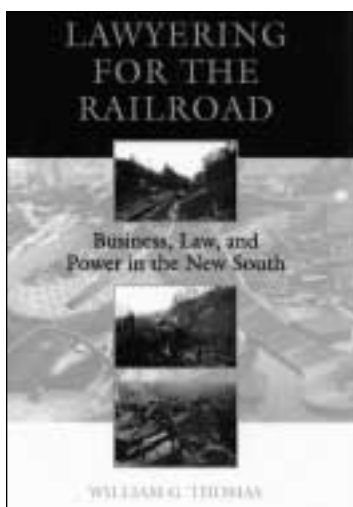


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Lawyering for the Railroad

Business, Law, and Power in the New South

By William G. Thomas

Louisiana State University Press, 1999

318 pp. Cloth \$47.50, Paper \$24.95

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The train runs through Waynesville, North Carolina twice a day. Once, at supertime, the three-car freight going to Sylva stopped across the street from Clyde's Restaurant and sat idling while the engineer and brakeman came over and had supper. They gave five-year-old Grace Queen and her mother a tour of the engine and a sample of the whistle before resuming their journey.

A new method of distributing goods and services is constructed in a startlingly short period of time. Isolated communities are suddenly connected to each other and the outside world by a universal, common carrier. The builder becomes rich, powerful, admired, and hated. Its monopoly brings government lawsuits, and politicians call for regulation or breakup.

The story of Microsoft in the 1980s and 90s?

The story of interstate railroads in the 1880s and 90s.

Between 1880 and 1900, interstate railroads expanded explosively throughout the South. By 1890 nine out of ten counties in the South were served by a railroad, in a region where, outside of the depot towns, roads were mud tracks and Indian trails. The railroad was the only well-capitalized, centrally organized business enterprise in those counties. The depot master had the only paycheck in town drawn on an out-of-town bank. If you followed a grunting mule down a furrow for a living, the railroad engine was the biggest moving instrumentality of man you ever saw in your life.

In *Lawyering for the Railroad*, William G. Thomas reveals this picture through the peculiar prism of the lawyers who helped make it possible. The practice of law in the South was transformed by the presence of the interstate railroads, whose lines needed lawyers as smart as the train engines were powerful. They got what they needed by hiring the best, most politically connected practitioner in every county they passed through, and being hired by the line was enough to transport a country lawyer from genteel poverty to vacations in Highlands.

The initial legal work was to acquire construction rights-of-way. This required delicate negotiations, since the “road” tried to avoid expensive condemnations or complexly engineered structures. Politics played a major role in determining locations, with citizen delegations traveling to Norfolk or Birmingham to plead for the line to run through their town. The economic geography of the South, down to this day, was determined by those routing decisions.

It was one thing to build a railroad, another to run it. The railroads’ operations “carved a path of death, destruction, delay, and deposition through the heart of the New South.” How appallingly dangerous the railroads were; it was commonplace for a steam engine’s cinders to start fires along the tracks and, well, the cow-catcher on an engine wasn’t for show. More tragic was the death of children, who, in their small towns, were unaccustomed to being supervised in their play. All too often they found the ballast rocks and steel rails inviting novelties.

Working for the railroad was one of the best jobs a smart, hardworking young man could aspire to in the turn-of-the-century South. Unlike local businesses, the road paid a pension when a man finished his thirty years on the job. Yet few collected those pensions, as Thomas tells it: “A passenger riding continuously on a train [at 30 miles per hour] might expect immunity from death by railway accident for 158 years, but an engineer, a brakeman or a conductor, under the same conditions, must expect a fatal accident at the expiration of 35 years [of eight-hour days].” This Interstate Commerce Commission report of 1889 is as horrifying as a probability calculation can be.

A passenger riding to Birmingham wrote a letter to the editor in 1890: “As the trip from Anniston . . . was made in daylight, I amused myself by counting the cars scattered along the track and turned over by recent wrecks, and got tired when the number reached twenty-five. Having seen what I did, I felt on my arrival here that I had cause for thankfulness in getting through with my whole bones.” He had traveled only about sixty miles that day.

Until George Westinghouse’s air brake was installed on freight trains (allowing the engineer to control all of the brakes on all of the cars from the locomotive cab), the brakeman walked along the top of the freight cars, turning the mechanical brake wheel on each car in turn. Rotten crossties and summer heat warped the rails, causing the train to lurch violently and without warning. In the South in 1892 one trainman out of every six was injured on the job and one out of every eighty-three was killed.

And often as not the lines got away with it. If the worker or his widow brought a lawsuit, the lines used the legal defenses of contributory negligence (a failure by the employee to look out for his own safety, demonstrated by his being injured or killed) or the “fellow servant” doctrine (if the injury was caused by the negligence of a fellow servant, the employer is not liable—and, since everyone who worked for the line was a fellow servant of the injured worker . . . well, you see how it

works). Physicians working full time for the road provided expert advice that was unavailable to the plaintiff's lawyer. If local juries were too likely to be sympathetic, the lines removed the cases to federal court, away from the families and friends of the injured. Many a railroad widow had to turn her fine home into a boarding house after tangling with the line in court.

It was a smooth operation, with the lines coordinating their defenses through regional law firms (called "district attorneys"). The biggest law firms in the South today can trace their roots to their appointments as district attorneys for the railroads. To this day law firms often specialize as representing either plaintiffs (injured parties, often railroad employees) or defendants (the deep pockets, the insurance companies and major corporations), and this specialization began a hundred years ago with railroad work.

The railroads did damage to the pocketbooks, as well as the skulls, of the citizens. Most lines were monopolies and they priced their services like monopolists. Every town and often every shipper (large or small) had a different rate for the different kinds of goods being carried. Small farmers seemed the most aggrieved, or at least the best connected in the legislatures, and they soon sought state regulation of freight rates, mirroring the Grange Movement of the Midwest.

Predictably, the lines hired lawyers to lobby the legislature, and for years they were successful in stalling effective regulation. The simplest and most effective lobbying tool was the annual free pass. Every line automatically issued a free pass to every legislator and every judge in the state, and everyone took them. Often a retired or defeated legislator, upon learning that he had been excluded from the pass list, wrote directly to the company, reciting past services and seeking a renewal.

The roads lobbied judges with passes, too. One young judge in North Carolina, Robert Watson Winston, was presiding over a personal injury case where the plaintiff's lawyer attacked the credibility of the train conductor witness, saying that the conductor traveled on a free pass, and "what else is a pass but a bribe?" This judge recounted in his memoirs that he sat in judgment with "no less than twenty-five free passes, over every railroad and every steamboat in the state" in his pocket. To his credit, he later worked to abolish the free pass in North Carolina and institute state-paid travel money for judges.

Thomas comes from a whole family of lawyers, back to his grandfather, and he tells this story with a fine sense of the business. He appreciates that lawyers have consciences, as well as overheads. This is a book for lawyers to get a sense of why we are like we are (law school doesn't teach anything about the history of lawyers), and also for any reader to see a society adapting to a sudden, wrenching technological change. With the government's whining about Microsoft's so-called monopoly power, it's nice to see a *real* monopolist coming down the line—whistle screaming, smoke blowing, horses scattering.