

Abraham Lincoln as a Railroad Attorney

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In February 1860 Abraham Lincoln was invited to address the Cooper Union in New York City. The significance of this event for his political career has been well documented by historians. The trip was noteworthy for another reason. Although it cannot be definitely established, it appears that Erastus Corning, president of the New York Central Railroad, offered Lincoln the position of general counsel of the company at the then princely sum of ten thousand dollars a year. Lincoln, of course, declined the offer. (Corning later was a harsh critic of the president's handling of civil liberties during the Civil War.) The importance of this offer—even if legendary—is its affirmation of Lincoln's strong reputation as a successful railroad advocate.

This essay will sketch Lincoln's legal practice as it pertained to railroading, look at several of his most important cases, and offer some reflections about Lincoln's conception of his role as a lawyer.

Reflecting his Whig philosophy, Lincoln had a strong personal and political commitment to railroads as a central part of his vision of economic growth. As an Illinois legislator, Lincoln supported state subsidies for internal improvements and voted for numerous railroad charters. In 1847 he characterized railroad building as “a link in a great chain of railroad communication which shall unite Boston and New York with the Mississippi.” He was elected president on a platform that declared: “That a railroad to

the Pacific Ocean is imperatively demanded by the interests of the whole country; that the Federal Government ought to render immediate and efficient aid in its construction.” As president, Lincoln signed the Pacific Railway Act of 1862 and the 1964 amendments to that act. Although he was clearly a railroad booster in the political arena, Lincoln’s dealing with the rail industry as a lawyer was more complex.

Admitted to the bar in 1837, Lincoln settled in Springfield. Over two decades he was a member of several partnerships, finally joining with William H. Herndon in 1844. Aside from routine office drafting of documents, he developed a heavy load of trials in the state and federal courts. As was the common practice, Lincoln traveled to different counties within a large court circuit in central Illinois. Lincoln spent about three months of every year away from Springfield riding the circuit. A successful courtroom lawyer, Lincoln also established a thriving appellate practice. He appeared before the Illinois Supreme Court in at least three hundred cases. Later in his practice he developed a large volume of work in the federal courts, primarily involving the collection of debts.

In March 1849, as Lincoln’s single term in Congress drew to a close, he argued a land title case involving the Illinois statute of limitations before the U.S. Supreme Court. The Court ruled against Lincoln’s position. Lincoln never argued before the high court again but was associated as counsel in four other cases.

Lincoln’s professional activities ranged over many areas of the law. As was the typical pattern, his income depended on modest fees from a large volume of cases. Most of the fees Lincoln charged were in the range of ten dollars to one hundred dollars, with twenty dollars as an average. He was sometimes paid in produce or clothing. Lincoln was no different than most Illinois lawyers who scrambled for business and accepted

almost any promising case. While certainly not rich, Lincoln earned enough to live comfortably.

Railroad construction expanded rapidly in Illinois during the 1850s. The decade saw the building of almost three thousand miles of track in the state, a development that opened Illinois to eastern trade and transformed the economic climate. Railroading presented new challenges for the legal system and new opportunities for Lincoln's law practice. Lincoln played a major role in fashioning the emergent railroad law and gained recognition for his efforts.

In 1851, in his first major railroad case, Lincoln represented the Alton & Sangamon Railroad before the Illinois Supreme Court in a case against a defaulting stock subscriber. The defendant, James A. Barret, contracted to purchase thirty shares of stock in the fledgling railroad at one hundred dollars a share. He made a down payment of five dollars, agreed to pay the balance when requested by the company, and received a stock certificate. The original planned route was near land owned by Barret, and he hoped that the value of his property would increase by virtue of the rail line. However, the Illinois legislature subsequently amended the company's charter and altered the route so that it bypassed Barret's land. In February 1851 the railroad called on the stock subscribers to make further payments under their purchase agreements. Barret and three other subscribers refused, arguing that the change of route constituted a fundamental alteration in the charter of the company and nullified their obligations. Two of the subscribers promptly settled when Lincoln instituted a lawsuit against them. Lincoln also brought suit on behalf of the railroad seeking \$1,350 from the recalcitrant Barret in unpaid subscriptions. Lincoln handled both the trial and the appeal, asserting that a change in

route did not relieve subscribers from contractual obligations. The supreme court agreed, holding that the legislature could amend the charter to address unforeseen construction problems. A charter amendment that did alter the original purpose of the company did not release individual subscribers. The *Barret* case was highly influential and was cited in a number of jurisdictions as well as treatises on railroad law throughout the nineteenth century. According to David Donald, this victory “established Lincoln as one of the most prominent and successful Illinois practitioners of railroad law.”

Lincoln appeared before the Illinois Supreme Court on behalf of the same carrier in an important 1852 eminent domain case. At issue was the appropriate measure of damages in a proceeding to condemn a right-of-way over plaintiff’s land. The Illinois statute provided that no monetary compensation was payable unless the injury to the owner exceeded the additional value to the remaining land derived from construction of the line. The Illinois Supreme Court accepted Lincoln’s argument and sustained the constitutionality of the statute as satisfying the “just compensation” requirement. It reasoned that the state constitution did not mandate the type of compensation and that an equivalent was rendered to the owner in the form of the increased value of the rest of his land.

In this case Lincoln cut to the heart of an intense debate in the antebellum era over the extent to which supposed benefits could be offset against the loss experienced by landowners whose land was taken for railroad purposes. Statutes in many states adopted the practice of offsetting imputed benefits. Although some state courts expressed doubt that a deduction for supposed benefits was consistent with the just compensation norm, courts in a number of other jurisdictions, including Illinois, upheld this policy. The result

was congruent with legislative efforts to encourage railroad development by limiting the compensation awarded landowners in eminent domain proceedings.

The offsetting of benefits, however, aroused controversy and fell into disfavor. Anticipated benefits from railroad development were highly speculative and might in reality never be realized. Moreover, the offset of benefits was often inequitable. Neighboring landowners also enjoyed increased land values resulting from railroad construction but did not have to bear the burden by having their property taken. A number of states therefore enacted statutes or amended constitutions to bar the consideration of benefits in calculating just compensation. Indeed, after the Alton & Sangamon Railroad instituted the proceeding in the 1852 case the Illinois legislature altered the law and provided that no advantages accruing to the community at large should be considered. Thus, Lincoln's victory was fleeting.

Lincoln also represented the Alton & Sangamon Railroad in dispute over the assessment of damages for taking a right-of-way. At issue was whether the jury could properly consider the fact that, once an award was made to the landowner, the railroad would not be bound to construct a fence on either side of its roadbed. The Supreme Court rejected Lincoln's contention that the jury was improperly instructed and affirmed a judgment of \$480 in favor of the landowner. This litigation indirectly posed the legal issue of whether railroads were obligated to enclose tracks. Before the enactment of fencing laws, many jurisdictions adhered to the common-law rule that railroads had no duty to fence lines against trespassing animals. Thus, the landowner would bear the expense if any fences were erected.

As this suggests, during the 1850s railroad cases increasingly occupied Lincoln's professional life. The Illinois Central Railroad was chartered in 1851 to fulfill the conditions of a federal land grant and was required to construct a line from the northern part of the state to its southern boundary. Lincoln first appeared for the Illinois Central Railroad, probably the largest business corporation in the state in May 1853. In October of that year Lincoln was placed on retainer by the Illinois Central and received an annual pass on the line. He represented the company during the period of construction and during years of economic distress caused by the panic of 1857. During the late 1850s Lincoln received more in fees from that carrier than from any other single client, and he was closely associated with the Illinois Central until his election to the presidency. Lincoln, however, never exclusively represented the Illinois Central. Nor was he the only attorney who appeared for the carrier before the Illinois Supreme Court. He took no part in some appeals by the Illinois Central and was usually teamed with another attorney on those appeals that he managed.

Lincoln appears to have handles more than fifty cases for the Illinois Central. Many of these were resolved at the trial level, but he argued eleven appeals for the line before the Illinois Supreme Court.

Several cases argued by Lincoln on behalf of the Illinois Central are of special importance. The first group of cases involves tax liability. One significant matter concerned the validity of a tax exemption granted by the railroad's charter. Concerned that fear of taxation would discourage private investment in risky rail projects, legislators in many jurisdictions used exemption from various taxes as a means of promoting development. Accordingly, the grant of tax exempt status to railroads was a common

practice. Such exemption, however, became controversial in time. Critics charged that exemptions constituted favoritism and unfairly burdened other taxpayers.

Under its 1851 charter, the Illinois Central was exempt from taxes for six years, the expected period of construction. Thereafter the carrier was required to pay 5 percent of its gross receipts to the state together with a tax on the company's property. The charter further provided that as a backstop the carrier would pay 7 percent of its gross receipts if the 5 percent tax and property tax yielded less than 7 percent. This "charter tax" was in lieu of any other state and local taxes. This was a high commutation charge relative to that paid by other lines in the United States. Indeed, it appears that no other carrier ever agreed to pay such a large percentage of its gross receipts in exchange for a tax exemption. Unhappy with this charter tax scheme and the consequent loss of revenue, McLean County assessed a tax on railroad property within the county. County officials argued that the legislature had no power to exempt the railroad from county taxes. If McLean County prevailed, then every political subdivision where the line went could collect local taxes. The Illinois Central, which feared that paying county taxes as well as the charter tax would bankrupt it, sought an injunction against collection of the county levy. In the McLean County case Lincoln was affiliated with James F. Joy, a prominent railroad executive and attorney, who was then serving as general counsel for the Illinois Central. Arguing for the railroad before the Illinois Supreme Court, Lincoln insisted that the legislature had the constitutional authority to grant tax exemptions or to commute the tax rate for a fixed sum. Lincoln's carefully prepared brief cited court decisions in other states that supported his position. The supreme court in 1856 adopted

Lincoln's analysis, holding that the legislature had broad power over taxation and could grant tax concessions for the public benefit.

Curiously, Lincoln's legal victory for the Illinois Central may have been costly for his client in the long run. It has been asserted that Lincoln saved the carrier millions of dollars. Later calculations, however, suggest that the company might have paid less overall if the entire charter tax arrangement had been declared unconstitutional. Paying 7 percent of gross income proved burdensome. The Illinois Central might have been better served to be taxed on the same basis as other carriers in the state.

There was an interesting coda to the McLean County litigation. Having initially received a retainer of \$250, Lincoln submitted a bill for \$5,000. That was a huge fee for a single case in that era. Lincoln rarely earned that much in a year. To put this fee in perspective, the governor of Illinois was paid \$1,500 annually and members of the Illinois Supreme Court received \$1,200 a year. The company refused to pay, and Lincoln brought suit to collect. A number of attorneys testified as to reasonableness of this fee, and the jury awarded Lincoln \$4,800. Threatened with a writ of execution, the Illinois Central promptly paid. There are several versions of this incident, and some details are cloudy. It has been argued that this was a "friendly" lawsuit, designed to give the company directors cover for paying such a large legal fee in view of the railroad's poor economic health. The carrier made only a token defense. Whatever the circumstances, the Illinois Central retained Lincoln as its counsel notwithstanding the fee dispute. It warrants mention that on other occasions Lincoln had to request the Illinois Central to pay overdue legal fees.

The company's willingness to settle with Lincoln may well have been dictated by its desire to retain his services in another dispute, this one with the state tax auditor. The auditor calculated that under the charter the Illinois Central owned \$94,000 in state property taxes for 1857 in addition to the 7 percent charter tax. A similar levy for future years was feared. The Illinois Central was already in a difficult financial position, and this additional burden might have caused the enterprise to collapse.

Lincoln fashioned a defense strategy that fused legal and legislative components. First, he successfully convinced the state auditor to delay any litigation to collect the higher property taxes for 1857 and 1858. When the auditor filed a debt action in November 1858 to recover the unpaid taxes, Lincoln persuaded the Illinois Supreme Court to continue the case. Second, the Illinois Central convinced the legislature in 1859 to pass a statute that empowered the state supreme court, upon an appeal from the auditor's decision, to make an independent property valuation of the assets of the company. This unique arrangement was never applied to any other property owner in the state. In 1859 the auditor again disapproved the company's valuation and placed a higher figure on its property. Lincoln promptly appealed to the supreme court. In November 1859, following two days of testimony, the court found the valuation of the Illinois Central to be the lower figure as determined by the company. Consequently, the company owed no additional tax for 1859. No opinion was written in this case.

Important as this victory was, it did not dispose of the auditor's earlier debt action for 1857 and 1858 property taxes. This case was argued by Lincoln in January 1860. Here, too, the state supreme court ruled in favor of the Illinois Central, adopting a lower valuation than that set by the state auditor. It emphasized the importance of present

income, rather than possible future income, in ascertaining the value of railroad property. On the eve of his nomination for president in May 1860 Lincoln won a significant tax case for his principal client.

A second cluster of cases concerns the duties of common carriers. Long before the advent of railroads public transportation services were treated as common carriers and were subject to special obligations. As common carriers, railroads were strictly liable without regard to negligence for loss or injury to goods entrusted to them. They were, in effect, insurers of goods shipped on their lines. Lincoln defended the Illinois Central in a number of cases resulting from injury to livestock because of delay in transit. These cases turned on the duties of common carriers in the novel circumstances posed by railroading. A pair of 1857 decisions by the Illinois Supreme Court illustrates the range of issues such cases presented. Lincoln unsuccessfully defended the carrier when a delay in a shipment of hogs during a cold spell caused a number of hogs to die and others to lose weight. The court concluded that the evidence supported the jury verdict in favor of the plaintiff.

Another case presented the much-debated question of to what extent railroads, as common carriers, could limit their liability for damages to goods or livestock in transit. Courts were divided on this matter, with most holding that railroads could contract to limit their liability as insurers but not to avoid loss caused by negligence. Generally the same rules governed the delivery of both goods and livestock, but courts recognized that the transportation of animals posed special problems. In the case of *Illinois Central Railroad Company v. Morrison* (1857) Lincoln persuaded the Illinois Supreme Court that railroads had a right to limit liability for damage to cattle caused by delay in transit. The

plaintiff, for a reduced charge, had agreed to release the Illinois Central from any claims for damage to a shipment of cattle except for gross negligence. Upholding the validity of this contract, the court declared: "Transportation of live stock in railroad cars, in their rapid motion, is attended with great hazard, against which, if the companies owning them had no power of protection, irretrievable ruin to them might be the necessary consequence." Clearly concerned that claims for livestock injury could prove too costly and hamper railroad enterprise, the court acknowledged that the rules governing common carriers needed to be modified to take account of the emerging rail system. Accordingly, the court concluded that the defendant railroad had the right to limit its common carrier liability by contract, pointing out that the plaintiff had the benefit of reduced rates as part of the contractual arrangements.

It is important to keep Lincoln's representation of railroads in perspective. In fact, Lincoln also regularly brought suit against railroads on behalf of individual clients. He instituted actions against carriers for nonpayment of supplies and for assessment of damages when land was taken by eminent domain. He also represented a landowner in opposition to a condemnation proceeding by the Chicago, Burlington, and Quincy Railroad to take land for depots and shops. Lincoln maintained that the charter language authorizing the acquisition of land for a route "with such appendages may be deemed necessary" did not extend to machine shops. The Illinois Supreme Court, however, had little difficulty in rejecting Lincoln's argument and holding that all conveniences necessary for the operation of the railroad were encompassed within the charter language. Lincoln only rarely handled personal injury cases, but he brought suit in 1854 against the Great Western Railroad Company for injuries sustained by his client, a railroad worker.

He also defended defaulting subscribers to railroad stock. But Lincoln's efforts to fashion a defense to subscription actions was ironically frustrated by his earlier success in the *Barret* case. The Illinois Supreme Court cited this decision as dispositive and reversed a lower court judgment in favor of Lincoln's client.

An allied question was the impact of a charter amendment on a subscription for railroad stock by local governments. It was a common practice for local governments to provide financial assistance to railroad companies. This often took the form of issuing bonds as payment for a subscription to railroad stock. In 1853 the voters of Cass County approved the issuance of fifty thousand dollars in bonds to purchase five hundred shares of stock in the Illinois River Railroad Company. The route was originally projected to run from Jacksonville to LaSalle. An 1854 charter amendment, however, provided that the carrier need not construct its line north of its connection with another railroad. Charles Sprague, a landowner and taxpayer in Cass County, sought an injunction restraining the county court from issuing the bonds. Representing Sprague, Lincoln maintained that the charter amendment was such a material change in the purposes of the company as to violate the rights of the subscribers. The Illinois Supreme Court rejected Lincoln's argument by pointing to the *Barret* case and affirmed the dissolution of the injunction.

In perhaps his most important lawsuit against a railroad, Lincoln represented Joseph Dalby in a dispute over the amount of a passenger fare. Dalby and his wife arrived at the station early to purchase tickets from the station agent at three cents per mile. As was common practice, the railroad company charged more for tickets purchased from the conductor on the train. Unfortunately, the station agent was sold out of tickets.

He gave Dalby a written memorandum explaining that Dalby had attempted to buy tickets at the three-cent-per-mile rate. Once on the train, however, the conductor threw the memorandum on the floor and demanded that Dalby pay the higher fare. When Dalby refused, the conductor threatened to put Dalby and his wife off at the next stop. At that stop the conductor and two brakemen tried to pull Dalby out of his seat, and in the ensuing fight Dalby was beaten. With his face cut and bleeding, Dalby paid the extra fare demanded and continued on his journey.

Retaining Lincoln and Herndon to represent him, Dalby brought suit to collect damages for personal injury. Among other defenses, the railroad maintained that the conductor used no more force than was necessary as authorized by law. Several passengers, called as witnesses, testified that the railroad employees had initiated the assault.

The jury found the railroad liable for the actions of its agents and awarded the plaintiff one thousand dollars. On appeal the railroad insisted that it was not responsible for an employee's assault and battery, an issue that had not been previously addressed in Illinois. Relying heavily on legal research by Herndon, Lincoln persuaded the Illinois Supreme Court that a corporation may be liable for the intentional torts of its employees. This result corresponds with the modern view.

The *Dalby* case gives us a window through which to view the exercise of power by railroads to remove passengers. As Sarah H. Gordon has written, antebellum passengers “frequently violated the most fundamental rule—paying for the ride.” As early as 1848, New York gave conductors legal authority to remove without unnecessary force any passenger refusing to pay the required fare. Railroad legislation in other

jurisdictions quickly followed suit. Typically, these statutes did not require that the passenger must be removed at a station. Accordingly, the general rule was that passengers who refused to pay were treated as trespassers and put off the train without unnecessary force at any point. The rationale for this authority was plain. The *Dalby* Court explained: “To deny to a railroad corporation the power to expel persons from its cars would be substantially to destroy its franchise to carry passengers.”

Despite the general acceptance of the principle that railroads could eject passengers for nonpayment, exercise of the right in practice often gave rise to controversy. One issue was of the character posed in *Dalby*. There might be a bona fide dispute about the amount of fare demanded by the conductor. Several decisions held the railroad liable when the conductor demanded an improper fare before removing the passenger. A second line of inquiry turned on the use of unreasonable force by railroad employees to accomplish the removal. Courts refused to sanction excessive force.

The fact that Lincoln, despite his commitment to railroading, often handled suits against the carriers casts light on his understanding of the lawyer’s role in society. To put it directly, Lincoln accepted whatever promising cases came his way. He continued to handle cases that involved modest amounts. In January 1860 he argued a mortgage foreclosure case before the Illinois Supreme Court involving a disputed interest charge of \$16.80. Economics was clearly an important factor in shaping Lincoln’s legal practice. He simply could not afford to take only one side in legal disputes. Nor did Lincoln pursue some political or philosophical agenda through litigation. He was not concerned with developing a consistent legal ideology.

Some nonrailroad cases illustrate this point. Lincoln was a lifelong opponent of slavery. In 1841 he argued before the Illinois Supreme Court to void the attempted sale of a young black woman and secure her freedom. Six years later he represented Robert Matson in an action to recover runaway slaves. Matson had brought his Kentucky slaves to work on his farm in southern Illinois. The slaves ran away and subsequently brought suit for their freedom on grounds that the Northwest Ordinance outlawed slavery into Illinois temporarily, and that therefore they remained in bondage. The circuit court rejected this contention, and Lincoln lost his case. His seemingly inconsistent position in these two cases tells us very little about his attitude toward slavery, but it speaks volumes about his conception of the practice of law. His business, as Donald reminds us, “was law, not morality.”

By the same token, it is an exaggeration to conclude, as historian Edward Pessen has done, that Lincoln was an “attorney for banks, insurance companies, gas companies, large mercantile firms, and manufacturers.” It is at best only partially accurate to present Lincoln as a corporate attorney. Although he represented railroads and businesses, he also sued them. As another historian has pointed out, Lincoln “still took business as it came, and opposed the corporate interests as often as he represented them.” This leads to the question of whether Lincoln was in fact a hired gun. Perhaps the last word on this point should go to Lincoln’s longtime legal partner, Herndon, who accurately declared that Lincoln was “purely and entirely a case lawyer.”

Lincoln’s success as a railroad attorney, however, casts doubt on Herndon’s characterization of Lincoln as the less competent member of the partnership. Herndon alleged that, while Lincoln was a skillful courtroom litigator, Herndon did the serious

legal research. Several commentators have gone so far as to assert that Lincoln lacked technical legal knowledge. Consider Herndon's biting assessment in his famous 1889 biography of Lincoln:

Lincoln was not, it is generally admitted, well versed in legal technicalities and precedents; he argued usually from the logic of the facts and the principles of justice involved. Herndon, on the other hand, had real skill in the search for authorities and citations to bolster his pleading. . . . There is little evidence to show that during his partnership with Herndon Lincoln ever performed the drudgery of digging up legal precedents.

Although Lincoln was by any measure a success in the practice of law, it is important not to exaggerate his achievements. One scholar has concluded that "if Lincoln had died before 1860, no one would ever have heard from him again." If it were not for his subsequent political prominence it is unlikely that historians would have devoted so much attention to Lincoln's law practice. By the same token, however, the ordinary dimensions of Lincoln's law practice make his career at the bar especially rewarding for legal historians. He is in fact a more representative figure of antebellum lawyers than elite attorneys such as Daniel Webster, who had a far more eminent practice.

One episode in 1855 underscores the limits of Lincoln's reputation as a lawyer. Lincoln was engaged as local counsel by a group seeking to break the patent of Cyrus McCormick, the inventor of the reaper. Lincoln represented Manny and Company of

Rockford, Illinois, in a patent infringement suit brought by McCormick. Eastern rivals of McCormick raised money to assist Manny's defense, and nationally recognized counsel were engaged. Manny retained George Harding of Philadelphia and Edwin M. Stanton of Pittsburgh as lead counsel, who thinking that the case would be tried in Illinois, hired Lincoln as a popular local lawyer. The patent infringement case, however, was eventually transferred from Chicago to the federal circuit court in Cincinnati. Although Lincoln never heard further from the team of attorneys, he nonetheless studied patent law, prepared an oral argument, and took the train to Cincinnati. The other lawyers were not impressed. Stanton was especially rude asking "why did you bring that damned long-armed ape here? He does not know anything and can do you no good." Lincoln was snubbed by the other attorneys and was not allowed to participate in the trial. As might be expected, he felt insulted and left for home in a dejected mood. The final irony, of course, is that Stanton later served as Secretary of War in Lincoln's cabinet.

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