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State of Utah v. Denver and Rio Grande Western Railroad Co. : Brief of Appellant

Utah Supreme Court

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JUN 17 1958

Court, Utah

In the
Supreme Court of the State of Utah

STATE OF UTAH, by and through its
ROAD COMMISSION,
Plaintiff and Appellant,

vs.

DENVER AND RIO GRANDE WEST-
ERN RAILROAD COMPANY, a Del-
aware corporation,
Defendant and Respondent.

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Case No.
8754

BRIEF OF APPELLANT

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Case No.
8754

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an interlocutory appeal made from an order of the Third District Court of Salt Lake County, Utah, denying the appellant's motion for an Order of Immediate Occupancy to respondent's property sought to be condemned (R. 93).

STATEMENT OF FACTS

The material facts in this matter are not in substantial dispute. Generally, the situation is this: A north to south

interstate freeway has been projected which, when constructed, will be adjacent to and east of the Denver and Rio Grande Main line running through the City of Midvale. Under the Federal Highway Act of 1956, there can be no crossing of streets or railroads at grade with the highway. The appellant must either underpass the proposed freeway and mainline crossing Center Street or overpass the branch spur at Center Street. The present plans propose to underpass the main line and the freeway at the intersection with Center Street (R. 31).

The Little Cottonwood Branch serves two customers east of State Street at a gross revenue of \$21,500 (R. 28-29). Two or more customers are served from a team track which will handle approximately ten carloads of freight per year (R. 82). The branch line in question has an assessed valuation of \$6,525.00 (R. 36).

Shortly after the interstate route throughout the nation was considered in 1948, it was determined that the most feasible and most desirable route through Salt Lake County is the one now projected (R. 63-64). If an overpass over Center Street and the branch spur in question is constructed, an undesirable condition will result leaving a grade crossing with restricted sight distance due to the overpass structure (R. 48-54). It would be most desirable rather than to spend the money for an overpass over Center Street to provide an underpass under the freeway and the mainline, thereby eliminating the hazard of crossing for the large volume of traffic using Center Street (8,000 vehicles per day) (R. 58).

Funds are now programmed for the design of the highway from Draper crossroads to Ninth North. Until it is known what type of structures will be required, designs cannot be prepared and right-of-way lines cannot be established since an overpass structure at Center Street would require wider rights-of-way due to the slopes of the approach piers (R. 51).

The State has now purchased 51% of the right-of-way between 7200 and 9000 South through the City of Midvale at a cost of \$277,000 plus (R. 33).

The freeway is programmed for construction within three to five years, and these plans cannot be completed until we know the disposition of this lawsuit (R. 39-41). After the route and all design features are definitely established due to a number of structures involved, it would take from one to two years minimum to design these structures and acquire necessary rights-of-way. We are now constructing an overpass at the north end of the county (R. 51).

State Project 1580 calls for the widening of Center Street, and coincidental therewith obtaining the railroad right-of-way through Center Street. Rail traffic through Center Street amounts to approximately 80 railroad cars per year (R. 82-83).

STATEMENT OF POINTS

POINT I.

THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR IMMEDIATE OCCU-

PANCY OF THE PREMISES SOUGHT TO BE CONDEMNED.

POINT II.

APPELLANT HAS A MORE NECESSARY PUBLIC USE OF THE PREMISES SOUGHT TO BE CONDEMNED THAN HAS RESPONDENT.

ARGUMENT

POINT I.

THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR IMMEDIATE OCCUPANCY OF THE PREMISES SOUGHT TO BE CONDEMNED.

POINT II.

APPELLANT HAS A MORE NECESSARY PUBLIC USE OF THE PREMISES SOUGHT TO BE CONDEMNED THAN HAS RESPONDENT.

The Order appealed from reads in part as follows:

“And the Court being fully advised in the premises now finds that the evidence introduced at said hearing is insufficient to justify the issuance of an order permitting the plaintiff to immediately occupy the premises sought to be condemned pending the action.”

The question to be determined by this appeal is whether appellant has an immediate need for occupancy of the prop-

erty for a more necessary public use than respondent. For the sake of brevity, both points will be argued as one.

Section 12 of Article XII of the Utah State Constitution provides:

“All railroad and other transportation companies are declared to be common carriers and subject to legislative control * * *.”

The Legislature has seen fit under Section 78-34-9, of the Utah Code Annotated 1953, to enact the following section of our statute:

*“Occupancy of premises pending action. The plaintiff may move the court or a judge thereof, at any time after the commencement of suit on notice to the defendant * * * for an order permitting the plaintiff to occupy the premises sought to be condemned pending the action and to do such work thereon as may be required for the easement sought according to its nature. The court or a judge thereof shall take proof by affidavit or otherwise of the value of the premises sought to be condemned and of the damages which will accrue from the condemnation, and of the reasons for requiring a speedy occupation, and shall grant or refuse the motion according to the equity of the case and the relative damages which may accrue to the parties * * *.”*

Section 78-34-4, U. C. A. 1953, provides in part as follows:

“Before property can be taken it must appear:
* * *

“(3) If already appropriated to some public use, that the public use to which it is to be applied is a more necessary use.”

There are two projects involved in this matter, one being the widening and improvement of Center Street in Midvale; the other the construction of a grade separation structure at a point where the proposed freeway crosses Center Street in Midvale. In order to complete the project, condemnation of the right-of-way of the Little Cottonwood Branch Line of the Denver and Rio Grande Western Railroad Company is sought.

The freeway is in the planning stage. Land is being purchased for the right-of-way at a great cost to the taxpayers. If an overpass structure at the intersection of Center Street were built, it would not only be erected at a great cost, but would be a perpetual hazard to motorists traveling Center Street.

The spur and branch line of respondent is used but very little under existing circumstances and conditions. The assessed valuation is nominal and the revenue is very small. The daily traffic of 8,000 vehicles through Center Street as against the branch line of the Railroad being used only occasionally for the transportation of approximately 80 carloads of material per year over its line at a total gross revenue to the Railroad Company of approximately \$25,000.00 indicates the higher use which appellant desires to put respondent's property. The most feasible plan to construct the highway in conformity to the Federal Highway Act of 1956 would be to underpass the Denver and Rio Grande Western mainline and the freeway at the intersection of Center Street in Midvale. It will take from one to two years to fully plan the structures and the design of the highway so it is necessary to obtain immediate occu-

pancy of the property involved in this action to accomplish the speedy construction of the highway.

This is not a unique case and we find that almost universally under statutes similar to ours when necessity for immediate occupancy for a higher public use arises, a motion for immediate occupancy should be granted by the court.

In the case of the *Delaware and Hudson Railroad Corporation v. The Public Service Commission*, 254 N. Y. S. 578, the order of the Public Service Commission directing construction of underpass was held to be authorized though it was incidental to a taking of the railroad yards and would destroy the use of the property.

In the case of the *Town Superintendent of Highways of Frankfurt*, cited in 87 N. Y. S. 2d 453, 194 Misc. 732, the court held that if the public interest were prejudiced by delay, immediate occupancy pending the proceedings is proper. See also *Home Gas Company v. Kuruc*, 132 N. Y. S. 2d 316. Where protection is further provided against loss or damages as may be finally awarded, the condemnor is entitled to immediate entry, *Electric Power Board of the City of Nashville v. Thoni*, (Tenn. 1947), 184 Tenn. 459, 201 S. W. 2d 649.

In the case of the *Denver and Rio Grande Railroad Company v. the City of Denver*, 250 U. S. 242, the court held that a city ordinance directing removal of tracks from the city street was not assailable where resulting expense and loss of revenue would be relatively small and no longer essential to the Railroad Company.

In discussing the question of more necessary public use we call the Court's attention to the case of *The State v. Superior Court*, 28 Wash. 2d 476, 183 P. 2d 802, decided in 1947. In that case the Supreme Court cited the case of the *State ex rel. Washington Water Power Co. v. Superior Court*, 8 Wash. 2d 131, 132, 111 P. 2d 577, wherein the Court stated:

“A municipal corporation may be given the right by the legislature to condemn and take the property of a privately owned public utility corporation already devoted to the same public use, the reason that the use of the public utility by a municipal corporation is larger in scope and a more general benefit to the public.” (Cases cited.)

In the case of the *State ex rel. Eastvold v. Superior Court of State, Skagit County, et al.*, 44 Wash. 2d 607, 269 P. 2d 560, decided in 1954, the trial court dismissed the petition of the State of Washington in eminent domain proceedings in which the state sought to appropriate the right-of-way of Drainage District No. 17, a municipal corporation in Skagit County for the purpose of converting existing primary State Highway No. 1 to a four lane limited access highway. The Court unanimously held that the State highway authorities could condemn property of municipal corporations already in public use as long as the condemnation proceedings were in good faith and not of an arbitrary, capricious or fraudulent nature on the part of the State highway authorities.

Under a statute somewhat similar to 78-34-9, U. C. A. 1953, *supra*, the Court of Appeals of Maryland, *State's Road Commission v. Franklin*, 201 Md. 549, 95 A. 2d 99

(1953), the court held that the State Road Commission had authority to enter upon the property prior to condemnation when necessary to speedy accomplishment of highway construction.

In the case of *Alberton Southern Railway Co. v. State Highway Department of Georgia*, 211 Ga. 838, 89 S. E. 2d 645 (1955), a condemnation proceeding by the State Highway Department was commenced against the railway to obtain part of the railroad's right-of-way for public road purposes. In that case the Court held that where the State was acting through its duly constituted agency, it had paramount authority in the matter of taking any property within its boundaries for those public uses to which it might reasonably devote such property, including that which had already been devoted to a different public use and therefore could condemn a portion of the railroad right-of-way for public road purposes.

CONCLUSION

It is the contention of the plaintiff and appellant in this matter that there is an immediate necessity for the taking of the property involved for the reason that it will take from one to two years to plan and design structures for the highway program as outlined under the Federal Highway program of 1956. This is rather a question of fact and from all the evidence contained in the record it appears to the appellant that not only does the appellant have a higher and better use for the property involved, but that it has an immediate need for occupancy. The Rail-

road Company is amply provided for in the way of damages, if any, and on the other hand, the State of Utah is being greatly handicapped by not being able to prepare, design and determine the necessary structures that will be involved in the course of the construction of the free-way. The use to which the State seeks to put the right-of-way of the D. & R. G. Railroad Company is larger in scope and has a more general benefit to the public than the spur line of the Railroad Company. We think the Court erred in denying the application of appellant for immediate occupancy in view of the evidence adduced and that it abused its discretion in denying such application and that such order appealed from should be reversed.

Respectfully submitted,

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