

1958

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

Utah Supreme Court

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In the
Supreme Court of the State of Utah

FILED

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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.

Clerk, Supreme Court, Utah

Case No.
8754

UNIVERSITY OF UTAH

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REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

ARGUMENT

Appellant deems it proper and expedient to reply to respondent's brief in order to amplify and clarify its reasons for its right to immediate occupancy.

Respondent in its brief refers this Court to Section 78-34-5, U. C. A. 1953, relating to the right of entry for survey and location. It is appellant's position that this section is not in any way applicable to the instant case. It is

not a question of entry for survey purposes. That has been accomplished. The resolution of the Road Commission describes with accuracy the property sought to be condemned compatible with the greatest public good and the least private injury. The question is, "should not the Road Commission have immediate occupancy for construction purposes?" The preparation of stable plans for the construction of the highway includes structural plans. If occupancy is denied the Road Commission will be substantially delayed in its plans and construction until this case is heard on its merits, with the possibility of an appeal from the trial court's findings. Such procedure could take one to two years—the time indicated to fully complete the planning of structures and design of the highway.

In an ingenious argument, the respondent states:

"Appellant does not explain why it is necessary to seize the railroad in order to plan the structures. The design or plan of structures is made in the drafting office of the project engineers, miles removed from the physical location. If any surveys are to be made upon the ground the Road Commission already has all necessary authority under said Section 78-34-5, supra."

In answer to the question raised by respondent, we submit the testimony of plaintiff's witness, Woodrow L. Anderson, (R. 48-51) which reads as follows:

"Q. (By Mr. Budge) Now, Mr. Anderson, what is the purpose of eliminating the railroad crossing in the City of Midvale?

"A. You mean the elimination of the Cottonwood Branch spur?

“Q. I mean the elimination of the railroad crossing over Center Street in Midvale, the main line.

“A. In the construction of the freeway if the Cottonwood Branch is maintained it would require an overpass over the Cottonwood Branch and Center Street. This would leave a very undesirable condition as to Center Street leaving it at a grade crossing with a restricted sight distance due to the overpass structure. It would be very desirable, rather than expend the money for the overpass over Center Street and the Cottonwood Branch Railroad, to provide an underpass under the freeway and the main line railroad, eliminating the hazard of the main line railroad crossing for the large volume of traffic using Center Street.

“Q. Now this freeway you are speaking of, what are the access requirements for that highway?

“A. I didn't quite catch that.

“Q. What are the access requirements on the freeway?

“A. There would only be access permitted at designated interchanges.

“Q. What about the streets now running east and west through Midvale other than Center Street. How would they be taken care of?

“A. They will be overpassed or underpassed within the city limits of Midvale, except an interchange will be provided at Sugar Street. A road beyond the city limits to the south, Ninetieth South, will be an interchange to provide access for the south end of Midvale.

“Q. What will happen at Wasatch Street in Midvale?

“A. Wasatch Street will be separated.

"Q. By an underpass?

"A. It is proposed an underpass under the highway and railroad.

"Q. And what about Sixth Avenue?

"A. The same thing applies there, an underpass under the highway, freeway and railroad.

"Q. Now if it were necessary to overpass Center Street, how high would the structure be?

"A. *The structure, the finished grade of the structure would be between 28 and 30 feet, depending on the design of the structure. That is allowing 24 feet railroad clearance.*

"Q. And would that structure make for any sort of hazard or hazardous condition as far as the roads are concerned out there?

"A. *As far as Center Street it would restrict the sight distance of the railroad.*

"Q. In what way? Explain that a little more.

"A. Well, it is proposed we provide approximately a 50-foot roadway for Center Street. *However, due to the piers or abutments of that structure adjacent to the track and the approach fills, sight distance would be obstructed until the traffic passes through the structure.*

"Q. Would the height of this structure constitute any damage to adjacent property owners, that is on the streets running north and south through Midvale?

"A. *Within the city limits, the homes immediately adjacent would probably suffer considerable damage due to the obstruction light, view and air.*

"Q. Now, at some future time if it were desired to underpass, to construct an underpass at Center Street, would that be feasible? I mean, if we overpassed it now and at some future time it became necessary to underpass it.

"A. It probably could be accomplished at considerable additional expense. The proximity of the existing overpass piers would probably involve retaining walls.

"Q. In order to construct a roadway between these piers for an underpass in the future, could the State of Utah at any time expect any Federal participation in such a project?

"A. At the present time there are no Federal funds available for that type of a construction. The underpass could be constructed as part of the interstate system if that construction is in the original design.

"Q. Now in your opinion is the proposed route through this town of Midvale of the freeway the best and most available route?

"A. The route has been studied for considerable time. It was selected approximately in 1948. Due to a matter of appropriations in Congress there was nothing further done on the route until last year when Congress passed the Interstate Act or the 1956 Act which provided for an interstate system.

"This route was very carefully reviewed by the State Road Commission and the Bureau of Public Roads and definitely adopted as the most feasible route.

"Q. And why, Mr. Anderson, will it take two to five years to get into actual construction?

"A. After the route and all design features are definitely established, due to the number of structures involved and the right-of-way, including homes, it will take from one to two years minimum to design these structures and acquire all necessary right-of-way.

"Funds are now programmed definitely for the design of this highway from the Draper Crossroads to Ninth North, and funds are available for acquiring of right-of-way.

“Q. Then, of course, you can’t design it until you know what sort of structures are going to be required?”

“A. That is correct. Nor can we definitely establish the right-of-way lines, as an overpass structure would require a wider right-of-way due to the slopes of the approach piers.” (Emphasis ours.)

We have no quarrel with the decision in the case of *Utah Copper Company v. Montana Bingham Consolidated Mining Co.*, 69 Utah 423, 255 P. 672, cited by respondent. We grant that the permitting of occupancy of the premises sought to be condemned during the pendency of the action is largely discretionary. In the instant case, the route of the highway has been defined and the structures to be built in conformity to the Federal Highway Act are on the drawing boards. Yet, we are presently denied permission to continue our construction program with any degree of certainty.

CONCLUSION

Appellant submits that there is actual need for the immediate right to occupancy of the premises sought to be condemned for the reasons stated in our brief and this reply brief, and that the order of the trial court should be reversed.

Respectfully submitted,

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