To be argued by:
SIMON HELLER
15 minutes requested

Court of Claims, Claim No. 102648

Supreme Court of the State of New York
Appellate Division – Second Department

NEW YORK CENTRAL LINES, LLC,

Claimant-Respondent-Cross-Appellant,

-against-

Docket No. 2011-03494

STATE OF NEW YORK,

Defendant-Appellant-Cross-Respondent.

BRIEF FOR STATE OF NEW YORK

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for State of New York
120 Broadway, 25th Floor
New York, New York 10271
(212) 416-8025

RICHARD DEARING
Deputy Solicitor General
SIMON HELLER
Assistant Solicitor General of Counsel

Dated: December 22, 2011

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

New York Central Lines, LLC (CSX),

Claimant-Respondent-Cross-Appellant,

v.

State of New York,

Defendant-Appellant-Cross-Respondent.

Docket No. 2011-03494

Claim No. 102648
Court of Claims

STATEMENT PURSUANT TO C.P.L.R. 5531

1. The claim number of this proceeding in the Court of Claims was: 102648.

2. The full names of the original parties are as they appear above. There have been no changes.

3. This proceeding was commenced in the Court of Claims..

4. This proceeding was commenced on June 26, 2000. The Notices of Claim were served on or about June 5, 2000.

5. This proceeding is under the Eminent Domain Procedure Law for compensation for the taking of real property.

6. These appeals are from a corrected judgment of the Court of Claims (Marin, J.) entered on February 4, 2011, and from a decision of the same court and judge filed on September 23, 2010.

7. These appeals are being prosecuted on the full record.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

QUESTION PRESENTED 3

STATEMENT OF THE CASE 3

A. The Undiminished Utility of CSX's Rail-Corridor Property 3

B. Evidence of the Value of the Takings 7

C. The Court of Claims' Decision 10

ARGUMENT 11

THE COURT OF CLAIMS IMPROPERLY ADOPTED THE UNADJUSTED BASELINE ATF VALUE OF THE TAKEN PROPERTY IN AWARDING COMPENSATION TO CSX. 11

A. The Property Must Be Valued By a Cost Approach. 12

B. The Court of Claims Significantly Overvalued the Land Taken By Adopting the ATF Value. 15

CONCLUSION 20

TABLE OF AUTHORITIES

Cases **Page(s)**

Chiesa v. State,
36 N.Y.2d 21 (1974) 15

Matter of County of Suffolk,
47 N.Y.2d 507 (1979) 11, 14-15

Matter of Great Atl. & Pac. Tea Co. v. Kiernan,
42 N.Y.2d 236 (1977) 12, 14

Matter of Port Auth. Trans-Hudson Corp.,
20 N.Y.2d 457 (1967) 18

Matter of Saratoga Harness Racing, Inc. v. Williams,
91 N.Y.2d 639 (1998) 7

Union Pacific R.R. Co. v. Chicago Transit Auth.,
647 F.3d 675 (7th Cir. 2011) 6

Federal Statutes

49 U.S.C.
§ 10501(b)(2) 4

PRELIMINARY STATEMENT

This eminent domain case arises from the State's decision to shift the course of a short single-track rail line in Queens, known as the Fremont Secondary Line (FSL), that is operated by claimant New York Central Lines, LLC (CSX) within a federally regulated rail corridor.[1] The State shifted the rail line to widen and improve access to the Brooklyn-Queens Expressway (BQE). To achieve this, the State (1) appropriated less than seven acres of CSX's property in the rail corridor, partly in fee and partly through permanent or temporary easements; (2) gave CSX easements over certain other property to permit CSX to continue to operate its rail line over the shifted course; and (3) built new rail facilities that CSX now owns and uses to operate the rail line along the shifted course.

CSX has not claimed that the taking diminished or impaired its commercial use of the rail corridor: CSX operates the same

---

[1] CSX Transportation, Inc., is the successor in interest to New York Central, and respondent is referred to in this brief as CSX.

single-track rail line now that it did before the taking. Nor does the record suggest that CSX had any plans to make other use of the property in question. Indeed, because the railroad industry is heavily regulated, the rail-corridor property could not be sold to a nonrailroad operator without the approval of the federal government. In addition, an agreement with the City of New York prohibited CSX from making additional use of the corridor property without the City's consent.

Despite these legal restrictions, and despite the fact that CSX's commercial use of the property is unimpaired, the Court of Claims held that CSX was entitled to over $12 million in compensation for the property (plus statutory interest), based on the per-square-foot value of adjoining private property that is not subject to the same legal restrictions as CSX's rail corridor. That award vastly overcompensates CSX at taxpayers' expense, and this Court should reverse it. Moreover, this Court should modify the award to reflect the opinion of the State's expert that just compensation equals fifteen percent of per-square-foot value of the adjoining private property.

QUESTION PRESENTED

Whether just compensation to CSX for the taking of certain property in its rail corridor should equal the per-square-foot value of adjoining private property, where the railroad's present use of the rail corridor is unaffected by the taking and any future use of the property is subject to legal restrictions that do not apply to the adjoining private property?

The Court of Claims awarded compensation equal to the per-square-foot value of the adjoining private property.

STATEMENT OF THE CASE

A. The Undiminished Utility of CSX's Rail-Corridor Property

The FSL is a freight rail line about eight miles in length that runs from the Oak Point Yard in the Bronx across the East River by way of the Hell's Gate Bridge to Queens, terminating at Fresh Pond Junction, also in Queens (R. 7-8). CSX owns 3.86 miles of the FSL, entirely in Queens (R. 8). Both before and after the takings at issue here, CSX operated a single-track rail line within

its right-of-way on the FSL (*see* R. 11). As of the time of the taking, the FSL was a lightly used line: in total, about ten to twelve freight trains ran in each direction per week (R. 12).

By federal law, the federal Surface Transportation Board (STB) has "exclusive" jurisdiction over "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State." 49 U.S.C. § 10501(b)(2). Thus, without the approval of the STB, CSX could not abandon the FSL or sell property along the corridor that would transect, and therefore sever, the rail line.

In addition, use of the FSL is restricted by the Franchise Agreement of 1907 that imposes significant restrictions in permitting the rail line to cross New York City streets (*see* R. 2795-2796). Moreover, under this agreement, the City of New York is entitled to "open across the route of the Railroad Company any new streets whatsoever . . . and the Railroad Company shall give its consent to such opening and shall convey to the City free of encumbrance and without charge all such land lying within its right-of-way as may

be required for such streets (subject only to the Company's easement" (R. 2678-2679; *see also* R. 2679 (if the City needs to widen streets "after the Railroad Company has completed its railroad, and such widening requires the alteration of the superstructure of the railroad, the Railroad Company and the City shall each pay one half of the cost of such alteration.")). Under this agreement, non-rail "use of the Fremont corridor is limited, if not effectively blocked," and "there had been no such [non-rail] use as of the taking or at any time prior thereto" (R. 13; *see also* R. 398 (claimant's expert conceded he knows of no accessory corridor use)).

In 2000, in order to construct improvements to the BQE, the State appropriated portions of property owned by CSX along a 0.9 mile stretch of FSL. The appropriations were taken partly in fee (236,836 square feet) and partly by permanent easement (43,856 square feet) (R. 8). (In addition, temporary easements were taken on five parcels of land owned by CSX, all of which had ended by the time of trial) (R. 8, 18-19).) The appropriation was effective

January 6, 2000, except that the temporary easement as to one parcel began on January 10, 2000 (R. 8).

Federal law prohibits the State from condemning any portion of the FSL if doing so would "prevent[] or unreasonably interfer[e] with railroad transportation." *Union Pacific R.R. Co. v. Chicago Transit Auth.*, 647 F.3d 675, 680 (7th Cir. 2011) (quotation marks omitted). Accordingly, in conjunction with the taking, the State undertook extensive measures to preserve CSX's rail corridor at the State's expense. Thus, the State paid for projects to shift the tracks, construct a second track for use during construction of the BQE project, and reconstruct abutments and bridges, and for other work needed to maintain the FSL as an active rail line. The State also gave CSX extensive permanent easements so that CSX could continue to operate its rail line over parcels taken by the State. Thus, after the taking, CSX operated the same rail line that it had before, and additionally had the use of three new rail bridges (in the place of five older bridges) and a new, second rail track.

B. Evidence of the Value of the Takings

At trial, consistent with the specialty nature of the FSL, the State's primary appraiser, James MacCrate, valued the property taken using a cost approach (R. 2819), also sometimes referred to as "reproduction cost less depreciation," *Matter of Saratoga Harness Racing, Inc. v. Williams*, 91 N.Y.2d 639, 643 (1998). MacCrate valued the 3.86 miles of the FSL owned by CSX before and after the taking (R. 2778). With respect to the property taken in fee, he first determined the "across-the-fence," or ATF, value per square foot of the adjoining unrestricted private property near the rail corridor (R. 2819).[2] He further determined that because the parcels taken "had limited utility before and have similar utility after" the taking, the value per square foot of CSX's property equaled fifteen percent of the ATF (R. 2846; *see also* R. 342-343 (claimant's expert testifies that "the functionality of the rail line both before and after remained exactly the same")). MacCrate concluded that the ATF value of an equivalent area of

---

[2] The parties agreed on the value per square foot of adjoining land (R. 1390-1391).

private property was $10,095,212, and that fifteen percent of that amount equaled $1,514,282 (R. 2846). The latter number represented the net loss to CSX as to the property taken in fee.

With respect to the property taken by permanent easement, MacCrate found that the ATF value was $1,600,000, but that the value of the permanent easement over CSX's property should equal five percent of the ATF amount because the easements do not affect the operation of the rail corridor. This meant that the permanent easement caused a net loss of $80,000 to CSX. (R. 2850.) Finally, MacCrate estimated an annual fair market rent for the parcels taken by temporary easement at $23,671, although he cautioned that these parcels "are not readily marketable and it is highly unlikely that they would be leased" (R. 2851). Thus, MacCrate testified that the total loss to CSX from the permanent takings in fee, permanent easement, and temporary easement would equal approximately $1,594,282.[3]

---

[3] MacCrate also found that the improvements to the property made by the State so that the FSL would remain an operating rail corridor were worth $26,640,000, significantly more than the total

(continued on next page)

CSX's appraiser used a different method of valuation—the comparable sales approach—that is not appropriate for specialty properties like the FSL line. Moreover, even if this approach were appropriate, the fourteen sales he used to develop a "corridor factor"—a multiplier of 2.5 to be applied to the ATF value R. 1556) —were not actually comparable to the FSL line (*see* R. 3398), and thus should have been rejected by the Court of Claims. The sales all involved lines longer than the FSL (*see* R. 3450). The fourteen sales he considered were, with one exception related to a sale in the Washington, DC metropolitan area, all outside the northeast quadrant of the United States (R. 424-425). Many of the fourteen sales were of mainline railroads, rather than secondary lines like the FSL, and thus also not comparable for this reason (see R. 3398-3399). And, on average, they involved ATF values per square foot which were less than ten percent of the FSL ATF value, because they were, on the whole, not in high-priced urban

---

of the losses to CSX in fee, permanent easement, and temporary easement takings. MacCrate thus concluded that "[s]ince the value after is greater than the value before, there are no damages." (R. 2852.)

areas like Queens (R. 3399). Finally, the claimant's expert "adjusted" initial corridor factors he determined in a manner that resulted in a higher suggested corridor factor for the FSL than for several of the corridors he judged were superior to it (R. 3408).

C. The Court of Claims' Decision

The Court of Claims eschewed both the claimant's and the State's method of valuing the taking. The court declined to apply CSX's requested "corridor factor" multiplier because it properly observed that the record did not demonstrate "that the permanent takings impaired CSX's ability to run its freight operations or run them under any well-founded view of future operations" (R. 10). The Court instead adopted its own novel approach to valuation of the taking by essentially adopting the ATF amount itself—the per-square-foot value of the adjoining private property not used for rail operations—as the value of the property taken within CSX's rail corridor, simply asserting that this value could be used because "there was no disturbance of existing or future rail use" (R. 16). And, even where significant rights were reserved to CSX by an Easement Restatement Agreement regarding 19,207 square

feet of land taken in fee, the Court valued the taking at 100 percent rather than the *claimant's* proposed 50 percent (R. 17).

ARGUMENT

THE COURT OF CLAIMS IMPROPERLY AWARDED CSX COMPENSATION EQUAL TO THE PER-SQUARE-FOOT VALUE OF THE ADJOINING PRIVATE PROPERTY

In determining the compensation to be awarded CSX, certain fundamental principles are applicable. "The general rule is that when land is taken in eminent domain, its owner is to be compensated for the market value of the property in its highest and best use." *Matter of County of Suffolk*, 47 N.Y.2d 507, 511 (1979). Here, the parties agree that the highest and best use of the property is as a rail transportation corridor (R. 8 (decision), 1428 (claimant); 2811-2814 (State)). The Court of Claims determined the market value of the property taken within CSX's rail corridor essentially by applying the value of property adjacent to the rail line (the ATF value) to the taken property (R. 16). As set forth below, this method of determining the award was error. It assigns to this limited use corridor the values of the surrounding

densely populated and more broadly useful lands and should be vacated in favor of an award that reflects the different and significantly more limited utility of the corridor lands.

A. The Property Must Be Valued By a Cost Approach.

The evidence at trial showed that three possible valuation approaches are used by courts (and appraisers) in determining the market value of real property: (1) the sales comparison approach; (2) the income capitalization approach; and (3) the cost approach (R. 2815-2817). The sales comparison approach (attempted by the claimant's expert) cannot be used here because there are no comparable sales of rail corridors, and because the sale of an entire rail corridor is not comparable to sale or condemnation of a portion of a rail corridor that allows the railroad to continue to operate its rail line. CSX's expert inappropriately relied only on rail corridor sales hundreds of miles outside New York State in his appraisal of the taken property. *Cf. Matter of Great Atl. & Pac. Tea Co. v. Kiernan*, 42 N.Y.2d 236, 241, 242 (1977) ("it is generally true that comparable sales should not be too remote in location

from the subject property"; allowing use of out-of-state comparable sales where there was "a broad regional market for [the] type of" property).

The income capitalization approach values the property by capitalizing net income from the property "at an appropriate rate to derive an estimate of value" (R. 2816). The income capitalization approach cannot be used: CSX presented no evidence of, and the State had no independent evidence of (R. 3396), income generated by the FSL (*e.g.*, R. 416-418 (claimant's expert did not have information about CSX's income from the FSL)). Certainly there is nothing in the record suggesting that CSX's income from the FSL was diminished at all as a result of the taking, given that CSX continued to operate the line the same way after the taking as it did before the taking.

Because neither the comparable sales nor income capitalization approaches can be used, here the cost approach must be used. That approach "estimate[s] the market value of the land assumed vacant and available for development to its highest and best use," then adds the "cost of improvements," and finally adjusts this sum

by adjusting "to reflect losses in value due to depreciation" (R. 2816).

Moreover, the cost approach was the appropriate method because the FSL is specialty property. *See Matter of County of Suffolk*, 47 N.Y.2d at 511 ("where a property is so unique as to constitute a specialty, the owner *must* be compensated by adding to its land value the replacement cost of the property and subtracting from that sum depreciation" (emphasis added)). The CSX property taken is a "specialty" property because of the railroad's improvements to the property (tracks, ballast, and supporting rail structures) and because its use as a rail corridor cannot be abandoned without federal approval, nor can it be used as a corridor for nonrail purposes (such as a pipeline).[4] *See Matter of Great Atl. & Pac.*, 42 N.Y.2d at 240 ("a specialty may perhaps be best defined as a structure which is *uniquely* adapted to the business conducted upon it or use made of it *and* cannot be

---

[4] Despite his use of sales of longer, out-of-state corridors to value CSX's property, claimant's own expert conceded that he could "certainly understand how some could view railroads as a special use property" (R. 412).

converted to other uses without the expenditure of substantial sums of money" (emphasis in original)); *Matter of County of Suffolk*, 47 N.Y.2d at 512 (specialty property has unique improvements with a special use and has no sales market).

B. The Court of Claims Significantly Overvalued the Land Taken By Adopting the ATF Value.

As stated above, the cost approach first values the land taken, and then adds to that figure the replacement cost of the improvements, less depreciation. In this case, the calculation reduces to a determination of the value of the land taken because the improvements were actually replaced by the State with equivalent improvements, at the State's expense.[5]

It is undisputed that the highest and best use for CSX's property is for operation of a commercial rail corridor. It is also

---

[5] The State's expert took into account the cost or value of the newly constructed improvements in his assessment of damages to CSX (R. 2862). The State concedes that under Court of Appeals precedent improvements can only be used to offset consequential damages against remaining property. *Chiesa v. State*, 36 N.Y.2d 21, 26-27 (1974).

undisputed that CSX's use of the rail corridor for this purpose is undiminished and unimpaired as a result of the taking. Any loss of land value to CSX as a result of the taking must therefore result from the possibility that it could have converted the land or some portion of it to some alternative or additional use.

The Court of Claims incorrectly awarded CSX compensation equal to the ATF value of the land taken, meaning the per-square-foot value of the private property across the fence from CSX's rail corridor. This value would correctly compensate CSX only if CSX were similarly situated to the owners of the adjoining property and able to market its property in the same way that those property owners can. But that is not true here.

In fact, the Court of Claims' award greatly overstates the loss to CSX because its rail corridor property is subject to legal restrictions that prevent CSX from selling portions of the rail corridor in the same way that the private landowners across the fence could sell their property. Thus, CSX could not sell the parcels taken by the State without obtaining the consent of the federal STB. There is nothing in the record suggesting that CSX

had or has any intention of trying to obtain the consent of the STB to discontinue the use of the property as a rail corridor and sell it on the open market. Nor is there any evidence suggesting that CSX likely could obtain STB's consent, or evidence of the time or expense that would be required to do so. Likewise, there is no evidence that CSX was seeking, or likely to obtain, permission from New York City for nonrail use of the corridor. In addition, because the use of the corridor is subject to numerous restrictions under the Franchise Agreement with the City of New York, as well as possible future financial obligations to the City under that Agreement,[6] the value of the land within the corridor is lower than the ATF value because CSX's property is not available for other, nonrailroad-related, corridor uses (such as a pipeline). Because the Court of Claims' award fails to reflect these legal restrictions,

---

[6] For example, CSX may be required to convey land to the City at no charge in certain cases where the City decides to open a new street within the railroad's right-of-way, and CSX is required to bear all the costs "of regulating, grading and paving the street so opened within its right-of-way." *See supra* at 4-5. These unpredictable costs associated with ownership of the parcels make them less valuable than adjoining, unencumbered property.

it is erroneous and the matter at least must be remanded for a new trial.

Ultimately, however, a remand is not necessary because the record contains a sufficient basis for this Court to modify the award. To be sure, the legal restrictions on the sale and use of the FSL make the market value of the land taken more difficult to assess. But the Court of Appeals has made clear that "when the market value has been too difficult to find, or *when its application would result in manifest injustice to the owner or public*, courts have fashioned and applied other standards." *Matter of Port Auth. Trans-Hudson Corp.*, 20 N.Y.2d 457, 468 (1967) (emphasis in original) (quoting *United States v. Commodities Corp.*, 339 U.S. 121, 123 (1950).

Under these principles, the State's appraiser properly assessed the value of the land taken at fifteen percent of the ATF value to account for the serious restrictions on its sale or use by CSX, as well as the fact that CSX's current use of the property has not been impaired by the taking. There was no evidence that the taking of the parcels reduced the railroad's income; nor was the

railroad's functioning diminished by the State's taking. Moreover, as to certain parcels taken, CSX maintained, by virtue of the Easement Restatement Agreement with the State, its rights to construct necessary railroad facilities and its ability to use the parcels for the FSL (R. 1645-1654). And the parcels taken could not simply have been sold by CSX for commercial or residential development because such a sale requires federal approval, at least if it interrupts the use of the corridor as a rail line.

In light of this evidence, the ATF amount does not properly reflect the value of the loss to CSX. Accordingly, that amount should be reduced by the percentages the State's appraiser proposed, or by such other percentage as the Court finds appropriate to account for the undiminished utility of CSX's rail corridor and the reduction in its value resulting from federal regulation and the Franchise Agreement.

CONCLUSION

For all the foregoing reasons, the judgment of the Court of Claims should be vacated and the award to CSX should be reduced to $1,594,282 or, in the alternative, the matter should be remanded to the Court of Claims for further proceedings.

Dated: New York, NY
December 22, 2011

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for the
State of New York

By: Simon Heller
SIMON HELLER
Assistant Solicitor General

120 Broadway
New York, NY 10271
(212) 416-8025

RICHARD DEARING
Deputy Solicitor General
SIMON HELLER
Assistant Solicitor General of Counsel

Reproduced on Recycled Paper

CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 NYCRR § 670.10.3(f)

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface: Century Schoolbook
Point size: 14
Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 3,638.