

To be argued by:
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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.

REPLY BRIEF FOR STATE OF NEW YORK

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	
PRELIMINARY STATEMENT.....	1
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	4
ARGUMENT	7
POINT I - THE COURT OF CLAIMS PROPERLY REJECTED CSX'S REQUEST FOR A WINDFALL 2.5 MULTIPLIER TO BE APPLIED TO THE BASELINE ATF VALUATION OF THE TAKEN PROPERTY.....	7
POINT II - THE BASELINE ATF VALUATION AWARDED BY THE COURT OF CLAIMS EXCEEDS THE MARKET VALUE OF THE PROPERTY TAKEN AND SHOULD BE REDUCED.....	13
A. The Cost Approach Is Justified and Was Correctly Applied by the State's Appraiser.	13
B. The Award of the ATF Value Should be Reduced Because Its Overstates the Market Value of the Property Taken.....	16
CONCLUSION.....	17

TABLE OF AUTHORITIES

Cases	Page
<i>City of Troy v. Town of Pittstown</i> , 306 A.D.2d 718 (3d Dep't 2003).....	15
<i>Matter of Great Atlantic & Pacific Tea Co. v. Kiernan</i> , 42 N.Y.2d 236 (1977)	14

PRELIMINARY STATEMENT

This eminent domain case arises from the State's decision to shift slightly the course of a short single-track rail line in Queens County owned by claimant New York Central Lines, LLC (CSX), in order to widen and improve access to the Brooklyn-Queens Expressway (BQE). The scope of the taking was small—less than seven acres of CSX's property—and the State gave CSX easements over certain other property to permit CSX to continue to operate its rail line, known as the Fremont Secondary Line (FSL), over the shifted course and built new rail facilities that CSX now owns and uses to operate the rail line along the shifted course.

In its cross-appeal, CSX contends that compensation for the taking should be based on the corridor valuation methodology advocated by CSX's appraiser, which sought a valuation for the taking equal to 250 percent of the across-the-fence (ATF) value of private property adjacent to the rail corridor. The corridor valuation methodology is a variation of the familiar "comparable sales" approach to valuation; it produces a "corridor factor," or multiplier, that purports to measure the importance of a corridor

and thus a premium to be paid for a corridor above the value of adjoining land. The Court of Claims properly rejected this argument for several reasons. First, CSX's appraiser incorrectly sought to value the taking here based on sales of entire rail corridors, even though CSX's rail corridor was not taken by the State, and indeed it is undisputed that CSX's use of the rail corridor for the FSL is undiminished. Second, even if this case did involve a taking of the FSL as a rail corridor, the "comparable sales" approach would be inappropriate here because there is no in-state or even regional market for rail corridors like the FSL. Third, CSX's appraiser did not present evidence of sales of rail corridors comparable to the FSL; instead he cobbled together his proposed 2.5 multiplier based on his flawed analysis of a small number of sales of *incomparable* rail corridors, many of which were located hundreds or thousands of miles away from the New York City metropolitan area.

In opposing the State's appeal of the Court of Claims' decision to award the baseline ATF value, CSX has failed to demonstrate that the property taken has value even remotely

similar to the value of adjacent land in Queens. Indeed, the very fact that its expert resorted to sales of rail corridors hundreds and thousands of miles away from Queens indicates that there is *no market* for property within a rail corridor like the FSL. And CSX's claim that it leased portions of the rail corridor to other businesses simply confirms that the property taken when the State shifted the FSL line is excess and completely inessential to the operation of the rail corridor, whose limited commercial use remains unimpaired. Nor is there any evidence in the record to suggest that the ATF value of the adjacent private property is an appropriate measure of the value of any diminution in CSX's ability to lease land within the rail corridor to other businesses. The Court of Claims' award of the ATF value overcompensates CSX at taxpayers' expense, and this Court should reverse it.

QUESTIONS PRESENTED

1. Where the State appropriates a portion of a railroad corridor in such a manner that the use of the property for railroad purposes is unimpaired, whether evidence of a range of

incomparable sales of rail corridors outside the State and outside the entire region of the nation is a proper basis upon which to award compensation at 250 percent of the value of land adjoining the railroad property?

The Court of Claims answered no.

2. Where the State appropriates a portion of a railroad property the use of which is limited to railroad purposes by law, whether it is appropriate to award compensation for property taken by eminent domain based on the value of adjoining private property not subject to similar legal restrictions, without taking into account what utility the taken property had to its owner before the taking or whether it was marketable?

The Court of Claims answered yes.

STATEMENT OF THE CASE

The State's Statement of the Case is set forth in its principal brief as appellant. We emphasize certain additional salient facts here regarding the so-called "comparable" sales relied upon by

CSX's appraiser, as well as the method of analysis he applied to those sales.

CSX's appraiser purported to use a modified comparable sales approach to value the property taken by the State. As explained in the State's first brief, that approach is not appropriate for specialty properties like the FSL line for which there is no demonstrable local or regional market. See Brief of State Appellant at 12-15. Even if this approach were appropriate, the fourteen sales used to develop a "corridor factor"—a multiplier of 2.5 to be applied to the ATF value (R. 1556)—were actually *not* comparable to the FSL line (*see* R. 3398), and certainly not comparable to the small pieces of land taken here that do not constitute a corridor. The CSX appraiser's comparison sales all involved lines longer than the FSL (*see* R. 3450). Second, 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); aside from the single Washington, DC sale, the others were over hundreds or even thousand miles away from New York City, primarily in

Florida and Texas (R. 1539-1543). Many of the fourteen sales were of mainline railroad corridors, 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 areas like Queens (R. 3399). Moreover, 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); for example, he gave "little weight" to several sales he deemed "comparable" because they involved abandoned corridors (R. 1542).

The Court of Claims rejected application of CSX's proposed 2.5 multiplier as advocated by CSX's appraiser because the court 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 approach

to valuation of the taking by essentially adopting the ATF amount itself (equivalent to a multiplier of one)—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, even though significant rights were reserved to CSX by an Easement Restatement Agreement (R. 17), and even though the rail corridor was subject to a Franchise Agreement that sharply limited its use as a corridor other than as a rail line.

ARGUMENT

POINT I

THE COURT OF CLAIMS PROPERLY REJECTED CSX’S REQUEST FOR A WINDFALL 2.5 MULTI- PLIER TO BE APPLIED TO THE BASELINE ATF VALUATION OF THE TAKEN PROPERTY

CSX urges this Court to direct award of a 2.5 multiplier of the ATF value of the property taken by the State. This would constitute a vast windfall for CSX, which has utterly failed to demonstrate its entitlement to such an enhancement of the ATF value of the taking.

The Court of Claims correctly ruled that CSX was not entitled to a premium as to the taking of its property based on examples of sales of entire rail corridors, since in this case there was no evidence that the shifting of CSX's rail corridor "impaired CSX's ability to run its freight operations or run them under any well-founded view of future operations" (R. 10). Indeed, it appears that even the original proponents of the "corridor factor" approach to valuing railroad takings would not apply this approach to the partial taking here. (See R. 2044-2045 (entire ATF methodology inapplicable where the taking "did not affect railway operations"); R. 1670 (article by founder of corridor factor method pointing to "300 examples of actual sales of corridors for *continued* corridor uses" (emphasis added).) The fact that no rail corridor was taken here, and that CSX's rail operations in its corridor are unimpaired, is a sufficient ground by itself not to apply the valuation method using a "corridor factor" in this case.

Moreover, in addition to the ground identified by the Court of Claims, CSX's attempt to obtain a higher valuation of their property based on a "corridor factor" of 2.5 also fails because CSX's

appraiser did not even consider a single truly comparable sale of a rail corridor in support of his opinion, let alone consider any comparable sales of small parcels of land within a rail corridor whose sale or taking did not affect the railroad's operation. He considered fourteen rail corridor transactions to be "comparable," but his own commentary on those sales demonstrates that they are not comparable to the taking at issue here.¹ Notably, not a single sale he considered is within New York State; most are sales in Florida and Texas. But the differences are not limited to geographical remoteness alone. For example, "Comparable Corridor Sale 007," is summarized by CSX's appraiser as a mainline rail corridor eighty-one miles in length in Florida (R. 1539-1540)—whereas the portion of the FSL involved in the takings here is a secondary rail line less than one mile in length.

¹ Indeed, on cross-examination, CSX's appraiser conceded that his criteria for determining "comparability" were (1) whether the sale involved a corridor; (2) that he had sufficient data about the sale; and (3) that the sale was an "arm's length negotiated transaction" (R. 448). That his broad definition of comparability would yield a total of fourteen sales nationwide over a period of more than twenty years confirms that there is no market for property like the FSL.

This sale also involved *purchase of the mainline itself for a rail system* (R.1539), which is hardly comparable to the taking here of a small amount of rail corridor acreage that leaves the subject rail line completely intact. In other words, in this “comparable” sale, the buyer *obtained the mainline corridor*, while the takings at issue here do not give the State a “corridor” at all. At the other end of the spectrum, several of the “comparable” sales considered by CSX’s appraiser were viewed “given little weight” because he found that they involved abandoned rail lines. (See R. 1542-1543 (“Comparable Corridor Sales” 295-136, 291-435, 546-26, 3327-1843, 7489-1409 all “given little weight”).)

Given that the sales of rail corridors he relied upon were not actually comparable to the taking at issue here, it is not surprising that CSX’s appraiser next resorted to a series of dubious, *ad hoc*, quantitative and qualitative adjustments. He first appears to have tried to determine factors that led purchasers to pay more than the ATF value for the corridors he viewed as comparable, graphing the corridor factors he found in his fourteen “comparable” sales against criteria like the type of

corridor, its location, and length, and then drawing lines in each scatterplot that purport to identify trends (R. 1544-1545). But the limited number of sales he considered make these quantitative analyses highly questionable. For example, he concludes that "the longer a corridor, the lower its corridor factor," but considers only one corridor over eighty miles in length, and two over fifty miles in length; nine corridors were less than twenty miles in length (R. 1547). Without more sales of longer corridors to rely upon, it is quite possible that other factors explain the lower corridor factors for the longer corridors. Indeed, Figure 6 (R. 1547) shows that sales of shorter corridors do not consistently demonstrate a higher corridor factor; if the appraiser lacked three or four of the nine sales of shorter corridors in his sample, it would appear that there was no relationship between length and corridor factor whatsoever.

This sort of analysis led to "adjustments" of the actual corridor factors for corridor type, length, and purchase type (see R. 1548). These adjustments led to a higher "adjusted" corridor factor for an abandoned corridor in Florida than for a mainline

corridor in metropolitan Washington, D.C., among other things. After undertaking these quantitative adjustments, he then sought to compare “qualitatively” the “comparable sales” he had studied—and already adjusted once—to the FSL taking at issue here, finding a corridor factor of 2.5. Essentially, he placed the taking here between the two “comparable” sales he viewed as “least inferior and least superior to” the FSL line (R. 1549). This step appears to have reduced his sample of fourteen “comparable” sales, in the end, to just two comparable sales. Even this analysis produced what CSX’s appraiser termed a “rather broad” range of corridor factors from 1.89 to 3.21. He then, finally, purported to identify the “central tendency of the collective adjusted sales” as “in the area of 2.5.” (R. 1550.)

This analysis is hardly persuasive, let alone scientific. The sales that form the basis of it are not actually comparable; not one property sold is comparable to the portions taken of the FSL in the same way that houses sold in a residential development are likely to be comparable in value to a house of similar size in that same development taken by eminent domain. The number of sales

analyzed is so small that determining the factors that contributed to differing corridor factors is speculative at best.

For all of these reasons, the Court of Claims prudently and properly declined to apply the requested 2.5 multiplier to the ATF value in determining claimant's award.

POINT II

THE BASELINE ATF VALUATION AWARDED BY THE COURT OF CLAIMS EXCEEDS THE MARKET VALUE OF THE PROPERTY TAKEN AND SHOULD BE REDUCED

A. The Cost Approach Is Justified and Was Correctly Applied by the State's Appraiser.

CSX asserts that the State's use of the cost approach to value the taking of its property was inappropriate because comparable sales are available upon which a valuation can be based, and because the State did not present evidence to support a cost approach. CSX is wrong in both assertions.

First, as discussed above at 8-10, even CSX's own appraiser did not actually find comparable sales: he instead located fourteen sales nationwide whose only point of arguable "comparability" was that they were arm's length sales of railroad corridors somewhere

in the United States. The fact that the majority of this small number of sales were from Florida and Texas shows that there is no “broad regional market for this type of” rail corridor, *Matter of Great Atl. & Pac. Tea Co. v. Kiernan*, 42 N.Y.2d 236, 242 (1977)—a factor which alone rules out use of a comparable sales approach. Nor does the fact that the State had some information regarding other corridor sales (CSX Br. at 40), mean that a comparable sales approach is viable. And each of the sales considered by the CSX appraiser appear to have been sales of a *corridor*, not, as here, of property that does not form a corridor at all (*see* R. 1409).

Because a comparable sales approach cannot be used without either local comparable sales or a “broad regional market” for similar property—neither of which exists on this record—either an income-capitalization approach or a cost approach must be used. As the State pointed out in its opening brief, an income capitalization approach was not possible because no evidence was available regarding CSX’s income from the FSL line (R. 3396). See Brief of State Appellant at 13. This leaves a cost approach, which the State’s appraiser used.

The cost approach used by the State's appraiser yields the following result: the value of the property taken is based on the ATF value and then reduced because the property taken is subject to legal restrictions and other conditions that make its value less than the value of adjacent private property. The cost of improvements is irrelevant because the State left CSX with newer and better improvements than before the taking. Nor is the cost of "assemblage" of a rail corridor relevant here, because the State did not take the corridor itself, but only a handful of parcels along the corridor that resulted in a slight shift in the corridor's course. After the taking, CSX retains rights to a rail corridor connecting the same two endpoints as it possessed before the taking. Moreover, an assemblage factor makes no sense where, as here, the State's appraiser concluded that the corridor was less valuable than the "disassembled" parcels of adjacent land. See *City of Troy v. Town of Pittstown*, 306 A.D.2d 718, 722 (3d Dep't 2003) ("plottage [or assemblage] factor was unnecessary . . . because the independent parcels were actually more marketable than their

aggregate, given the practical and legal limitations on marketing the reservoir”).

B. The Award of the ATF Value Should be Reduced Because Its Overstates the Market Value of the Property Taken.

CSX asserts that the State’s appraiser’s proposed an eighty-five percent reduction in the ATF value of the property taken is unjustifiable. See CSX Br. at 51-52. But this assertion misconceives the appraiser’s approach. These parcels have less value than the ATF value because they are part of a corridor that is not marketable, i.e., cannot be sold as such. In his expert opinion, the FSL corridor is worth much less than the surrounding real estate in Queens because no one would purchase the property in an arm’s length transaction. Moreover, significant work would be required to render the corridor marketable as non-corridor parcels because of the topography of the rail corridor (R. 916-917). Thus, his proposed eighty-five percent reduction in the ATF value of the property taken is justified. *See also* R. 2045 (recognizing important difference between takings that are longitudinal along the corridor and those, like the taking here, “which did not

interfere with the railroad's operation"; Southern Pacific Railroad often would charge *nothing* for transverse crossings that did not materially impair its operations).

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.

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Respectfully submitted,

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