

ARK.] CITY OF BRYANT v. SPRINGHILL WATER
AND SEWER SERVS., INC. 336-A
Cite as 295 Ark. 333 (1988)

SUPPLEMENTAL OPINION ON DENIAL OF
REHEARING JUNE 6, 1988

750 S.W.2d 61

MUNICIPAL CORPORATIONS — CONDEMNATION PROCEEDINGS —
WHERE THE FEE TITLE WAS NOT TO CHANGE HANDS, A RAILROAD
COMPANY MUST PAY THE DIFFERENCE IN VALUE BASED ON A
TAKING. — Where the fee title to the land was not to change hands
and there was not to be a “reciprocal vesting” of fee title at any
point, and where the railroad rather than waterworks condemna-
tion statutes applied, there was nothing for the railroad to give back
to the owner after abandonment of the condemnation proceeding,
and fundamental fairness required that the railroad pay the
difference in value based on a taking, but where the waterworks
condemnation statutes would apply, where the fee title was to vest,

and where there was something to give back to the owner, the fundamental fairness considerations were not the same; *Missouri Pacific Ry. Co. v. Huggins*, 253 Ark. 309, 485 S.W.2d 723 (1972) is not overruled.

DAVID NEWBERN, Justice. The appellees seek rehearing on the ground that our opinion fails to follow *Missouri Pacific Ry. Co. v. Huggins*, 253 Ark. 309, 485 S.W.2d 723 (1972), which the appellees cited in their brief. They contend that we have overruled that case without citation or discussion of it.

In the *Huggins* case, the railroad instituted condemnation proceedings against land adjacent to its right-of-way for the purpose of removing a large protruding rock which threatened to fall on the right-of-way. After the order of entry, the railroad entered the land and removed the rock. It then sought to dismiss the condemnation proceedings subject to any damages the landowner had sustained. We wrote:

We hold that when a railroad posts bond, obtains an order of taking, enters upon the property and completes its work, it is obligated to pay just compensation based upon the difference in fair market value before and after the taking. This is based on the rule that fundamental fairness dictates that there should be a point at which the railroad cannot turn back and escape the payment of full compensation based on a taking. [Citations omitted].

[1] We did not cite the case because we regard it as unique and, like *Selle v. City of Fayetteville*, 207 Ark. 966, 184 S.W.2d 58 (1944), which we cited for general language but carefully distinguished, the *Huggins* case is one to which the railroad condemnation statutes would apply rather than the waterworks condemnation statutes. We noted in the *Huggins* case that the condemnation proceedings there were to add the land on which the rock was situated to the railroad right-of-way, and that the damages were to be "based upon" the difference in the value before and after the right-of-way taking as opposed to the market value of the land taken. The fee title to the land was apparently not to change hands. There was not to be a "reciprocal vesting" of fee title at any point. The railroad had entered the land and "complet[ed] its work." Unlike this case, there was nothing for the railroad to give back to the owner of the property upon the

abandonment of the condemnation proceeding. The railroad's purpose in obtaining right-of-way had been completely accomplished. Had the railroad succeeded in dismissing the condemnation proceeding, it would have, in effect, obtained its right-of-way, having to pay only the difference in the value of the land before and after removal of the rock rather than the difference in value "based on" a taking. The same "fundamental fairness" considerations would apply here, if the situation were the same, but it is not. The *Huggins* case has not been overruled.

Rehearing denied.

HOLT, C.J., and HICKMAN, J., concur.

DARRELL HICKMAN, Justice, concurring. The appellees on rehearing have prompted the majority to expand its decision justifying the city's action in withdrawing from its abusive use of the power of eminent domain.

Each generation of judges has taken the side of government over that of the individual owner of private property, forgetting that as time goes on exploitation of land and property by the government and its agencies should stop.

In this case the city took the water company, fired its employees, ran the water works for five months, and then walked out. Fairness under our decision in *Missouri Pacific Railroad Co. v. Huggins*, 253 Ark. 309, 485 S.W.2d 723 (1972), dictates that we not permit the city to cancel the taking.

HOLT, C.J., joins the concurrence.
