

Before the  
**SURFACE TRANSPORTATION BOARD**

ENTERED  
Office of Proceedings  
May 12, 2015  
Part of  
Public Record

STB Docket No. FD 35316

**ALLIED ERECTING AND DISMANTLING, INC.  
AND ALLIED INDUSTRIAL DEVELOPMENT CORPORATION  
- PETITION FOR DECLARATORY ORDER -  
RAIL EASEMENTS IN MAHONING COUNTY, OHIO**

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**REPLY OF RESPONDENTS TO  
JOINT MOTION OF ALLIED ERECTING AND DISMANTLING, INC.  
AND ALLIED INDUSTRIAL DEVELOPMENT CORPORATION SEEKING LEAVE TO  
CLARIFY ARGUMENT AND RELIEF SOUGHT**

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Dated: May 12, 2015

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There is currently pending before the Board, a petition filed by Allied Erecting and Dismantling, Inc. and Allied Industrial Development Corporation (collectively, “Allied”) on February 20, 2014, seeking to reopen the Board’s final decision served December 20, 2013 (the “*December 2013 Decision*”), and to supplement the record (the “Petition to Reopen”). Now, more than six months after the last filing with respect to the requested reopening of this proceeding (and more than 15 months after the filing of the Petition to Reopen), and for the third time in connection with the reopening, Allied has filed a motion requesting the right to file yet another pleading not otherwise permitted under 49 CFR § 1104.13(c) – this time ostensibly to “clarify” its legal arguments. As set forth below, Respondents<sup>1</sup> request that the Board deny the motion and exclude the proposed “clarifications.” In the event that the Board accepts Allied’s “clarifications,” then Respondents request that in the interest of having a complete record, the Board accept the response set forth herein, which disputes Allied’s claims that it is merely clarifying its prior legal position, and that the LTV Tracks at issue are private and not a rail line or excepted track.

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<sup>1</sup> Capitalized terms not otherwise defined herein, including the references to the parties, have the meanings set forth in Respondents’ Supplemental Reply filed September 15, 2014.

## Procedural Status

The Board issued a final decision in this proceeding on December 20, 2013, which found as relevant here, that the stopping and storing of rail cars by MVRVY or any of the other Railroad Respondents<sup>2</sup> is not prohibited by or a violation of the LTV easement. *December 2013 Decision*, at 15. On February 20, 2014, after filing an appeal with the United States Court of Appeals for the Sixth Circuit, Allied filed with the Board its Petition to Reopen. Respondents timely filed a Reply to the Petition to Reopen on March 12, 2014 (“Respondents’ Reply to Petition”), asserting that Allied had not met the requirements for reopening, but not responding to the allegedly new evidence presented by Allied with respect to the LTV Tracks and easement, or its implications. Allied responded by filing a motion (“Allied Motion No. 1”) seeking leave to file a reply to the Respondents’ Reply to Petition, which Respondents opposed. By decision served August 6, 2014 (the “*August 2014 Decision*”), the Board directed the Railroad Respondents to supplement their Reply to Petition to respond to the supplemental evidence Allied proposed to introduce and to Allied’s arguments with respect to the import of the supplemental evidence. The *August 2014 Decision* did not address Allied Motion No. 1, which Respondents continue to oppose.

Respondents filed their Supplemental Reply (“Respondents’ Supplemental Reply”) on September 15, 2014. On September 30, 2014, Allied again filed a motion seeking permission to file additional comments (“Allied Motion No. 2”), as well as the proposed comments (“Allied Proposed Comments”). On October 20, 2014, Respondents replied to Allied Motion No. 2 and the Allied Proposed Comments (“Respondents’ Reply to Allied Proposed Comments”)

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<sup>2</sup> Respondents do not claim that any Railroad Respondents other than MVRVY have a right to use the LTV Tracks and easement, and contend that none of the other railroads have used them. Allied has presented no evidence to the contrary. Accordingly, this Reply to Motion No. 3 will focus solely on the rights and actions of MVRVY, as Respondents have done in their previous responses with respect to reopening.

requesting that the Board deny Allied Motion No. 2 and not admit the Allied Proposed Comments into the record. In the event that the Board were to accept the Allied Proposed Comments, Respondents requested that the Board accept their response. The Board has not yet ruled on Allied Motion No. 2.

Now, Allied has filed a third motion (“Allied Motion No. 3) seeking authority to “clarify” its *arguments* as set forth in its prior filings concerning the proposed reopening. Despite numerous references in its pleading asserting the LTV Tracks were “excepted” tracks under 49 U.S.C. § 10906, and not “rail lines,” Allied now claims it never meant to refer to the tracks as excepted tracks. Allied Motion No. 3 does not seek to add any new or material facts to the record; instead it seeks to change the legal arguments previously made by Allied. Respondents request that the Board deny Allied Motion No. 3 since it will not aid the Board in having a more complete record.

### **Discussion**

#### **1. The Board should deny the Allied motion to clarify / change its argument.**

The Board’s regulations at 49 CFR 1104.13(c) are meant to control its docket, and to establish an end to filings so that a decision can be issued. *Waterloo Railway Company – Adverse Abandonment – Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine (“Waterloo Railway”)*, STB Docket No. AB-124 (Sub-No. 2) (served May 6, 2003), slip op. at 3 (“the pleading process ends with the reply, and replies to replies are not permitted”). While the Board will allow additional replies, and sur-replies if necessary, for “good cause” or when additional information is necessary to provide a complete factual record, *id.*, Allied Motion No. 3 does not seek to add any new facts to the record – instead, it seeks to change the basis on which Allied has been seeking reopening. The

factual references in Allied Motion No. 3 are unsupported and unverified conclusory statements that are not supported or supportable by the record. *See Peter Pan Bus Lines, Inc. – Pooling – Greyhound Lines, Inc.*, STB Docket Nos. MC-F-20904, *et al* (served April 20, 2011), slip op. at 3 (record not incomplete based on representations / alleged misstatements in other party’s reply; repetition of same arguments made in Petition rejected). *See also Waterloo Railway, supra*.

Allied has referred to excepted tracks or 49 U.S.C. § 10906 throughout its prior pleadings on reopening. *See* Petition to Reopen at 3; Allied Motion No. 1 at 5, 6, 8; Allied Proposed Comments at 2, 3, 4, 5, 6, 15. These numerous references cannot be explained as inadvertent confusion on Allied’s part. Allied indicates it is relying on the recent decision of the Board in *Pinelawn Cemetery – Petition for Declaratory Order*, STB Docket No. FD 35468 (served April 21, 2015) (“*Pinelawn*”), in requesting the opportunity to clarify its previous legal arguments. However, the portion of the *Pinelawn* decision that Allied references does not present any new legal theory, it merely articulates the long-standing distinctions between three categories of track as recognized by the Board and its predecessor the Interstate Commerce Commission. *See* Allied Motion No. 3 at 1-2. *See also Pinelawn*, slip op. at 6-7. Allied does not explain why it was previously confused although these distinctions are nothing new.

Allied’s arguments for reopening were deliberately made – alleging that the Board’s finding in the *December 2013 Decision* that the LTV Tracks were a “rail line” was incorrect and that this error was material to its decision. As discussed below, Respondents have demonstrated that there is support for the finding that the LTV Tracks are a “rail line,” and even if they are found to be excepted tracks, the error was not material to the Board’s decision, because excepted tracks are within the Board’s jurisdiction. This conclusion is supported by the Board’s recent decision in *Pinelawn*, slip op. at 6-7. Realizing the error of its arguments after *Pinelawn* was

issued, Allied now seeks to change (not clarify) its legal argument to claim that the LTV Tracks are “private” tracks, and that it never meant to claim the tracks were excepted tracks.

The Board will allow additional pleadings when necessary for the Board to have a complete factual record; however, it has not and should not permit such additional pleadings when a party is merely trying to construct a new legal argument to replace a losing one. Accordingly, Allied’s Motion No. 3 should be denied.

**2. If the Board were to accept the Allied clarification, then it should allow Respondents to respond thereto.**

If the Board were to consider Allied’s Motion No. 3 and the clarifications or changes in argument put forth, then it should also give Respondents the opportunity to respond and accept the responses set forth below.

**A. The evidence of record demonstrates that the LTV Tracks are not “private” tracks.**

The *Pinelawn* decision, slip op. at 7, confirms that private tracks are those used exclusively by a track’s owner for movement of its own goods. First, the LTV easement was created in 1993 when LTV sold the property east of the Center Street Bridge to Allied. The LTV easement provided for the continued use of the LTV Tracks on the property being sold by MVRVY as LTV’s lessee. At the time MVRVY was using the LTV Tracks to serve LTV locations outside of the property being sold, as well as to handle traffic for other customers between locations east of the property, and the CSX Transportation, Inc. (“CSXT”) interchange west of the property. Accordingly, since 1993 when Allied acquired the property at issue in this proceeding, the LTV Tracks have not been not reserved for the exclusive use of the owner of the property, but rather have been used to serve customers other than the owner.

Moreover, even prior to the sale to Allied and the reservation of the LTV easement, the LTV Tracks were not being used solely for providing service – despite Allied’s unsupported allegations to the contrary. Allied Motion No. 3 at 2. *See also*, Allied Proposed Comments at 13. Allied cites to no specific provisions of the easement or of MVRVY’s lease that reflect such limitations. Neither document contains any provisions limiting MVRVY’s service solely to LTV. *See* LTV easement, Allied Appendix Ex. A; 1990 lease, Respondents’ Appendix Ex. A-11

As Respondents have demonstrated, since MVRVY acquired trackage rights from Conrail in 1990 to access and pass through Haselton Yard, MVRVY has been using the LTV Tracks to serve not only LTV but to handle traffic to and from other customers located east of what is now the Allied property, over the property, to and from the connection with CSXT at the west end of the Tail Track. Respondents’ Supplemental Reply at 5-6; Respondents’ Reply to Allied Proposed Comments at 5-6. Further, the Transportation Services Agreement entered into between LTV and MVRVY at the time Summit View acquired control of MVRVY in 2001 (and the LTV easement was transferred to MVRVY) reflects the service being provided at that time by MVRVY, and contemplates MVRVY providing service interchanging LTV traffic with other carriers *and* service for third parties, as well as in-plant services for LTV. *See* Respondents’ Supplemental Reply at 7. Further, Allied cites to no specific provisions of the LTV easement that limit the transportation services that MVRVY can provide, including the stopping, storing and staging of cars.<sup>3</sup>

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<sup>3</sup> As acknowledged by Allied’s witness Spiker and discussed in the Respondents’ Supplemental Reply at 8 (fn 9), such uses would certainly be a common usage of excepted spur tracks.

**B. MVRV has previously demonstrated that there is sufficient evidence in the record to determine that the LTV Tracks were being used as main line tracks, and that otherwise they were being used as “excepted” tracks.**

Respondents have acknowledged that the tracks east of the Center Street Bridge may have been ancillary spur tracks (excepted tracks) when LTV acquired Republic Steel and MVRV became the rail operator. However, as explained in the Respondents’ Supplemental Reply, the use changed over time, and by 1990 when MVRV obtained trackage rights from Conrail through Haselton Yard, MVRV was using the tracks to handle traffic from shippers east of Allied’s property, across the LTV Tracks, to the “trail track” used for interchange with CSXT. Respondents’ Supplemental Reply at 5-9. By the time LTV sold the property to Allied in 1993, and Allied granted back the easement for the tracks and for MVRV’s use thereof, the LTV Tracks were being used to provide service to LTV and also to provide service to other customers located off the property. Moreover, Summit View showed the easement tracks as lines of railroad of MVRV in the petition for exemption that it filed with the STB in 2001 to acquire control of MVRV. *See* Respondents’ Supplemental Reply at 6-7.

To the extent the Board were to find that the previous filings by MVRV and Summit View do not establish that the LTV Tracks were being used as main line tracks, then as Allied previously argued, the Board should determine the status of tracks based on their use by MVRV. Allied Proposed Comments at 12. *See also Central California Traction Company – Petition for Declaratory Order – City of Lodi*, STB Finance Docket No. 32776, 1996 STB LEXIS 334 (1996) at \*6-7. The ICC long held that through the expansion of service, a track can lose its spur status and become a line of railroad. *The Atchison, Topeka and Santa Fe Railway Company – Abandonment Exemption – In Lyon County, KS*, ICC Docket No. AB-52 (Sub-No. 71X), 1991 ICC LEXIS 134 (1991) at \*7. Examining the service provided by MVRV beginning in 1991

handling traffic for customers in the CASTLO industrial park and LTV across the LTV Tracks for interchange with CSXT, the Board should find that the LTV Tracks became a line of railroad. *Central California Traction, supra*, 1996 STB LEXIS 334 at \*8-9 (branch used to carry through trains between points of shipment and delivery is a line of railroad).

If the Board does not believe that there is sufficient evidence that the LTV Tracks are main line tracks, then it is clear that they are excepted tracks. As confirmed in *Pinelawn*, slip op. at 6, trackage that is used for rail operations (including loading, storage and switching operations) incidental to a carrier's line-haul transportation are excepted tracks. These are just the type of services performed by MVRV on and over the LTV Tracks.

**C. Excepted tracks are not outside the jurisdiction of the STB.**

As MVRV has argued, and as the Board has repeatedly held, including in the *December 2013 Decision* and in *Pinelawn*, excepted tracks are still subject to the Board's jurisdiction. See Respondents' Supplemental Reply at 9. Section 10906 merely holds that the Board will not exercise its jurisdiction over the acquisition, operation or abandonment of such tracks. Indeed, 49 USC 10501(b) makes it clear that the Board's jurisdiction over spur tracks is exclusive even if the tracks are located within one state. Thus, even if the LTV Tracks are found to be excepted tracks, the state court litigation brought by Allied would be preempted.

**D. Allied still has not demonstrated any material error that would support reopening the *December 2013 Decision*.**

The essential question referred by the State Court to the Board in this proceeding was whether the LTV easement permitted the LTV Tracks across Allied's property to be used by MVRV (or the other Railroad Respondents) for the stopping, storing and staging of cars. In the *December 2013 Decision*, the Board answered in the affirmative. In reviewing Allied's Petition to Reopen, the question the Board should determine is not whether there was an error in the

interpretation of the ICC 1982 decision regarding MVRVY's authority to operate as a carrier, but rather if there were any error, was that error "material," *i.e.*, would the Board's decision regarding the permitted use of the LTV Tracks have been different. In Respondents' Supplemental Reply at 4-5, Respondents acknowledged that it now appears that the 1982 ICC decision regarding MVRVY's operating rights did not cover the tracks at issue in this proceeding; however, as Respondents have also demonstrated in Respondents' Supplemental Reply, the basis on which the Board could reasonably still find that the tracks were being used as main line tracks, and alternatively, the reasons why the Board's decision should be the same even if the tracks were found to be excepted tracks. Indeed, the Board has already determined that its decision would be the same whether the tracks are main line tracks or excepted ancillary spur tracks. *December 2013 Decision*, at 14.

Allied has not provided any evidence that the LTV Tracks are currently private tracks or that they have been at any time since Allied acquired the underlying property. Even if the tracks are determined not to be main line tracks, they should be found to be excepted tracks. As such, the Board clearly still would have the jurisdiction and the specialized knowledge to advise the State Court on what constitutes "transportation" and whether the LTV Tracks can be used for stopping, storing and staging as part of the transportation services being provided by MVRVY. Any error in the interpretation of the 1982 ICC decision was not "material" to the Board's decision, and the Petition to Reopen should be denied.

### **Conclusion**

Because Allied Motion No. 3 offers nothing new for the record, and is merely a subterfuge for Allied to change its legal argument, the Motion should be denied. Moreover, after taking all of the pleadings into consideration that the Board determines should be admitted, the

Board should determine that there is sufficient evidence to support the findings and conclusions of the *December 2013 Decision*, that any error in the *December 2013 Decision* was not material, and that the Petition to Reopen should be denied.

Respectfully submitted,



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Dated: May 12, 2015

## CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2015, a copy of the foregoing Reply of Respondents was served upon the following persons by email:

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