

Before the
SURFACE TRANSPORTATION BOARD

Docket No. FD 35316

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

**REPLY OF RESPONDENTS TO
PETITION TO REOPEN AND SUPPLEMENT THE RECORD**

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Dated: March 12, 2014

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The Board issued a final decision in this proceeding on December 20, 2013 (the “*December Decision*”). On February 20, 2014, after filing an appeal with the United States Court of Appeals for the Sixth Circuit, Allied Erecting and Dismantling Co., Inc. and Allied Industrial Development Corporation (collectively, “Allied”) filed with the Board a Petition to Reopen and Supplement the Record (the “Petition”) under 49 U.S.C. §722(c) and 49 C.F.R. §1115.4. As will be set forth more fully hereafter, because Allied has not met the standards for reopening, Respondents¹ request that the Petition be denied.

¹ The original Allied state court complaint named six railroad members of the “Ohio Central Railroad System” as defendants, those being: Ohio & Pennsylvania Railroad Company (“OHPA”), Mahoning Valley Railway Company (“MVRV”), Ohio Central Railroad, Inc., Warren & Trumbull Railroad Company, Youngstown & Austintown Railroad, Inc. and Youngstown Belt Railroad Company (the “Railroad Respondents”). In the subsequent Petition for Declaratory Order in this proceeding, Allied also named Railroad Respondents’ direct and indirect corporate parents, Summit View, Inc. (“Summit View”) and Genesee & Wyoming Inc. (“GWI”), as respondents. The *December Decision* dismissed Summit View and GWI as respondents. Although Allied has not challenged the dismissals in the Petition, in an abundance of caution, “Respondents” herein shall include the Railroad Respondents, Summit View and GWI.

Background

1. Procedural History

As noted in the *December Decision*, this declaratory order proceeding ultimately began as a referral from state court litigation that was begun in 2006 when Allied filed suit against the railroad Respondents. Based on a motion by the Railroad Respondents to dismiss the Allied action based on federal preemption, or in the alternative to refer the questions to the Board, the state court, in 2009, determined to refer three questions to the Board:

1. Whether Ohio Central's stopping and storing of railcars on the tracks associated with the easements, in alleged violation of the easement agreements, falls within the jurisdiction of the Board.
2. Whether the easement agreements allow Ohio Central to store or stage railcars on the tracks associated with the easements.
3. What damages are available to Allied if Ohio Central has violated the easement agreements.

December Decision at 7.

Allied filed a petition for declaratory order in November 2009 in which it asked the Board to address two additional questions:

1. Determine whether Ohio Central, its successors and assigns have any operating or other property rights over the tracks associated with the easements.
2. Find that the LTV Tracks are not main line tracks, but are instead ancillary, spur, side, or industrial tracks within the meaning of 49 U.S.C. § 10906.

December Decision at 8. Respondents replied, and after several additional pleadings, in June 2010, the Board instituted this proceeding and set a procedural schedule. *December Decision* at 8. The original schedule provided Allied with 75 days to file its opening statement; however, because of the "volume of discovery" the due date for the opening statement was twice extended by joint motion of the parties. *See* Decisions served September 3, 2010 and December 20, 2013.

Allied's opening statement was filed January 11, 2011, the Respondents' Reply was filed February 22, 2011, and Allied's Rebuttal was filed on March 17, 2011, closing the pleadings.

Thus, prior to the issuance of the *December Decision*, Allied had over 7 years from the time it first filed its lawsuit (and time before that while it investigated its potential claims), over 4 years from the time it filed its petition for declaratory order, and over 18 months from the close of pleadings, to conduct extensive discovery and to investigate and garner all of the information germane to its claims.

2. Current Status

At the time of the state court lawsuit, Allied had only purchased property from LTV Steel Company ("LTV") east of the Center Street Bridge on south side of Mahoning River in Youngstown, Ohio, and thus Allied's claims for violation of the LTV easement by Railroad Respondents related only the easement across that tract of property.²

During the pendency of the lawsuit and declaratory order proceeding, MVRVY has continued to use the LTV easement tracks. Although there are no customers located on the Allied property east of the Center Street Bridge crossed by the easement, MVRVY continues to move loaded and empty freight cars between its interchange with CSX Transportation, Inc. ("CSXT") to the west and its customers to the east of the Allied property in Struthers. MVRVY stores and services its locomotive in a shop building on property that MVRVY owns west of the Center Street Bridge. (The only exception to these operations is that since October MVRVY has not been able to operate between CSXT and Struthers, Ohio, over the LTV easement tracks because Allied, without prior notice, removed approximately 75 feet of track west of the Bridge,

² There are properties west of the Center Street Bridge that are the subject of another state court lawsuit, another referral to the Board and another pending declaratory order proceeding. However, those properties and related claims are not the subject of this proceeding or the *December Decision*. *December Decision* at 3-4, fn 13.

in order to perform storm sewer repairs. Although MVRV was originally told that the repairs would last several weeks, it has now been several months and the track has not been restored.) While MVRV's business needs do not currently require the stopping, storing or staging of cars on the LTV easement tracks, it has advised the Board that it may want to do so in the future.

OHPA has not operated over the Pittsburgh & Lake Erie ("P&LE") easement since 2006 when Youngstown and Southeastern Railway Company took over operations of the rail line between Youngstown and Darlington that includes the P&LE easement. OHPA has no intention of operating over the P&LE easement tracks.

3. The December Decision

In the *December Decision*, the Board made several findings, including that MVRV has authority to operate over the LTV easement tracks at issue, and that OHPA had authority to operate over the P&LE easement tracks when it was operating over them. *December Decision* at 2. (The Board additionally found that OHPA may have some residual operating authority over the P&LE easement tracks although operations are currently being conducted by another carrier that has been authorized by the Board. *December Decision* at 13-14.) Further, the Board found that the easement agreements do not contain restrictions prohibiting the stopping, staging or storing of cars. *December Decision* at 2.

All of the findings were fully supported by the record before the Board, and information obtained by the Board from its own investigation of public records.

Discussion

1. Standards for Reopening

A petition to reopen will be granted only if the petition presents new evidence or substantially changed circumstances that would materially affect the case, or demonstrates

material error in the decision being challenged. 49 U.S.C. §722(c); 49 C.F.R. §1115.4. *See also, V&S Railway, LLC – Petition for Declaratory Order – Railroad Operations in Hutchinson, Kan.*, STB Docket No. FD 35459 (served January 14, 2014), slip op. at 3. If material error is alleged, the petitioner must do more than make a general allegation; it must substantiate the claim. *Id.* Where the reopening request is based on new evidence, the Board has made clear that “the evidence must be newly available, and not just newly presented.” Florida Department of Transportation – Acquisition Exemption – Certain Assets of CSX Transportation, Inc., STB Docket No. FD 35110 (served June 22, 2011), slip op. at 4. *See also cases cited therein, Friends of Sierra Railroad v. ICC*, 881 F.2d 663, 667 (9th Cir. 1989); *Canadian National Railway – control – Illinois Central Corp.*, 6 STB 344, 350 (2002) (“new evidence” is not newly presented evidence, but rather is evidence that could not have been foreseen or planned for at the time of the original proceeding).

2. With respect to the LTV Easement, Allied has not provided any new evidence, or demonstrated material error.

With respect to the LTV easement, Allied attempts to introduce “new evidence” in its attempt to demonstrate that MVRV does not have common carrier rights to use the LTV easement and the tracks located within the easement. However, an examination of this new evidence clearly indicates that none of it is newly available evidence; rather it is all clearly just newly presented.

The purported new evidence includes the following³:

(a) MVRVY's Articles of Incorporation.(Petition at 1, 6-7). MVRVY's Articles of Incorporation have been available as an Ohio public record, presumably since MVRVY was incorporated in 1981.

(b) MVRVY Return to Questionnaire (Petition at 1, 4, 6-8). Allied claims that the Return to Questionnaire was "not available" to Allied until after release of the *December Decision*. However, that is not the case. Allied may not have known about Return to Questionnaire, but the *December Decision* indicates that the Return to Questionnaire is in the official case file. *December Decision* at 12, fn 65. As such it is and has been available to the public since the 1981 proceeding. Attached as an Appendix hereto is information from the Board's web site indicating that Board (and historic Interstate Commerce Commission) records are available and how to request them.

(c) Federal Register Notice, 46 FR 40097 dated August 6, 1981 (Petition at 2, 6-7). A Federal Register notice is a public notice and by definition is and has been available since it was published. Moreover, a copy of the Federal Register Notice was included in the Appendix filed by Respondents with their Reply in February 2011. *See also December Decision* at 11, fn 60.

(d) Testimony from William C. Spiker, Sr. (Petition at 2, 10 - 11, Verified Statement). No where in the Petition or the Spiker Verified Statement does it indicate when Allied first met or spoke with Mr. Spiker , how they located him or why he wasn't previously available. In any event, even if it were only recently, none of the information in the Spiker

³ The Petition indicates that certain documents are attached (1981 MVRVY Articles of Incorporation – p6, fn 4; 1984 J&L / Republic Certificate of Agreement of Merger – p. 10, fn 9); however the documents were not in fact attached. In any event, these documents are 30 or more years old and public records, and are definitely not new.

Verified Statement is new. It relates to his stated employment with MVRV from June 1981 until 2001. All of the information is therefore between 13 and 33 years old, and clearly does not constitute newly available evidence.

(e) Testimony from Matthew Schiedel and accompanying maps (Petition at 3, fn 2, Verified Statement). Mr. Schiedel acknowledges that he has worked for an affiliate of Allied since April 2009 (prior to the commencement of this proceeding), that he is the custodian of Allied's deeds and easements, and that he reviewed various deeds, easements, plats and tax maps, all of which are of record at the County Court House. Schiedel Verified Statement. Thus, while the maps may have been newly prepared, they are based on records that have been in Allied's possession and/or the public domain since before this proceeding began.

While it may be true that Allied did not discover any of the evidence it now seeks to submit prior to the issuance of the *December Decision*, all of it was available to the public or discoverable before or during the proceeding. Allied had more than seven years since it filed its state court action, and more than four years after its petition for declaratory order was filed to do discovery, to review its records and public records, and to investigate and discover any and all of the information it now seeks to submit. That it didn't do so does not make the evidence "new." Accordingly since none of the evidence presented constitutes "new evidence" that can support a petition to reopen, the Petition should be denied.⁴

Moreover, even if Allied were able to show that the LTV easement tracks are "excepted" tracks under 49 USC §10906 as claimed (Petition at 3), this would not have a material effect on

⁴ In this Reply, Respondents are only addressing whether the evidence presented by Allied to support its Petition is "new." It is not addressing the accuracy of the information or the implications Allied has asserted based on that information. Respondents reserve the right to investigate and challenge any or all of the information if the Board were to decide to reopen the proceeding.

the holdings in the *December Decision*. Allied acknowledges that since at least mid-1990, MVRV has operated over the LTV easement tracks to connect with, and ancillary to, MVRV's other tracks at the east end of the Allied property. Petition at 10-11; Spiker Verified Statement, ¶¶ 4, 9. Since at least that time (before the property was purchased by Allied), MVRV has continuously operated over the LTV easement tracks, continuing to use them to service its customers and to make interchange with CSXT, *i.e.*, MVRV has been using the tracks for railroad purposes first under its lease with LTV, and later as clearly permitted under the LTV easement. Further, the Board found that the easement does not contain restrictions on stopping, staging or storing of rail cars – a finding that would not be affected by the type of tracks. As the Board clearly noted (but Allied does not seem to understand), the Board has exclusive jurisdiction over Section 10906 tracks, even if it does not actively regulate those tracks. *December Decision*, at 14 n.74 (and citations set forth therein). *See also Grafton & Upton Railroad Company – Petition for Declaratory Order*, STB Docket No. FD 35776 (served January 27, 2014) (“G&U’s construction and use of the Parcel for rail carrier operations does not require our licensing authority because the construction of ancillary tracks and facilities is excepted from licensing by 49 U.S.C. § 10906. Nonetheless, the express statutory preemption of § 10501(b) applies here...”). Thus, Allied cannot through its actions or through the use of the state courts, interfere with MVRV’s use of the LTV easement tracks for railroad purposes regardless of whether the tracks are considered a line of railroad or Section 10906 tracks.⁵ The suggested change in classification of the status of the LTV easement tracks from line of railroad

⁵ Even the easement agreement that Allied cites provides that the easement can’t be vacated or relocated if it would “adversely interfere with either parties’ then existing operations or access to their properties.” Petition at 3.

to excepted tracks would not materially affect the Board's decision. Since no material error has been shown, the Petition should be denied.

3. With respect to the PL&E Easement, Allied has not demonstrated that the *December Decision* contains material error.

Allied does not seek to introduce any new evidence with respect to the PL&E, but rather broadly asserts that the Board's analysis is flawed. Respondents take this as an assertion by Allied that the Board's decision regarding OHPA's continuing residual operating rights over the P&LE easement is based on a material error by the Board. However, the error if any, by the Board does not affect the underlying claims in the proceeding that were referred to the Board, that being whether OHPA (or any of the other named Respondents) stopping, storing and staging of cars on the PL&E easement tracks was permitted under the easement. These claims can only relate to a time period when OHPA was operating over the tracks, that being from 1995 until 1999, and again from 2004 until 2006. In the *December Decision*, the Board found that OHPA was permitted to operate over the P&LE easement tracks during those time periods. Allied has not challenged that finding by the Board.

Rather, Allied appears to be challenging only the Board's suggestion that OHPA may have some residual authority to operate over the P&LE easement tracks. Petition at 19; *December Decision* at 13-14. However, this is not material in that OHPA has not operated over the segment since 2006 when Youngstown & Southeastern Railway Company took over operations, has not asserted any interest in operating over the segment, and does not intend to do so. Accordingly, even if the Board were in error in this suggestion, such an error would not be material and does not justify the reopening of this proceeding.

Conclusion

For all of the foregoing reasons, the Board should find that Allied has not presented any new evidence or shown any material error in the *December Decision*, and the Petition to Reopen should be denied.⁶

Respectfully submitted,



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Dated: March 12, 2014

⁶ If the Board were to reopen the proceeding and allow Allied to supplement the record, then Respondents request that they be given adequate time to conduct discovery with respect to the evidence submitted by Allied, including depositions of the witnesses that provided verified statements, and the examination of any documents on which they relied.

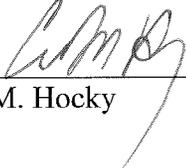
CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2014, a copy of the foregoing Reply of Respondents to

Petition to Reopen was served upon the following persons by email:

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Appendix

STB Web Site

(emphasis added)

Public Information > Inquiries: Office of Public Assistance, Governmental Affairs, and Compliance (202-245-0238)

OPAGAC

This office is the primary point of contact for the Board. Its staff is available to answer questions regarding general information and case-related issues; and records and publications. It is our mission to help the public understand the law and the Board's decisions, and to aid the public in presenting clear and concise filings for the Board's consideration.

The office is comprised of staff attorneys and transportation specialists trained to assist the public with inquiries from Congressional staffers, state and local government officials, and the public that are not routine, and require the skill of an attorney to research or answer.

In addition, we are the Board's primary record keepers. Many of the former Interstate Commerce Commission's (ICC) rail records (at least the more recent ones) are available on microfiche and our 1st floor staff is ready to assist callers with locating both current and historical records. For assistance call 202-245-0406.

Our records staff may be reached by phoning 202-245-0238 or 202-245-0406. The records staff can provide you with copies and certified copies of more recent Board and ICC records, and ensures that the agency continues to safeguard the legacy of ICC and current Board documents. Requests for document copies should be faxed to the records staff at 202-245-0461, or e-mailed to (STB.records@stb.dot.gov).

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Public Information > Inquiries: Library

The STB Library, located in room 131, is open to the public Monday through Friday, from 8:30 a.m. to 5:00 p.m. We accept requests for information via email, telephone, or in person. If you are planning to visit the library, it is highly recommended that you call ahead to insure that someone will be available to assist you.

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