

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35316

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

Digest:<sup>1</sup> A property owner filed a petition to reopen a prior decision by the Board regarding two easements over the property owner's land. After reviewing the submissions, the Board vacates and reverses a portion of its prior decision.

Decided: September 15, 2015

This case grew out of a state court lawsuit between Allied Erecting and Dismantling, Inc. and Allied Industrial Development Corporation (collectively, Allied) and six rail carriers that are members of the Ohio Central Railroad System (collectively, Ohio Central). In the suit, Allied sought an injunction that would bar Ohio Central from stopping, storing, and staging rail cars on tracks that traverse Allied's property, allegedly in violation of two easement agreements. Ohio Central contended, among other things, that Allied's lawsuit was preempted by the Board's exclusive jurisdiction over rail transportation. The court referred three questions to the Board concerning the Board's jurisdiction, the easement agreements, and the availability of damages. Allied filed a petition for declaratory order with the Board requesting answers to those questions and two other questions concerning the characteristics of the tracks at issue.

In a decision served on December 20, 2013, the Board concluded, inter alia, that (1) Ohio Central has authority to operate over the tracks at issue, (2) the easement agreements did not, as Allied claimed, bar Ohio Central from stopping, storing, or staging rail cars on the tracks, and (3) it was unnecessary to determine whether the tracks were mainline, as Ohio Central claimed, or ancillary tracks within the meaning of 49 U.S.C. § 10906, as Allied claimed.

On February 20, 2014, Allied filed a petition to reopen and supplement the record, challenging the Board's conclusion that Ohio Central has authority to operate over the easement tracks.<sup>2</sup> Allied argued that the Board had committed material error in construing certain

---

<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decision, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> On February 4, 2014, Allied filed an action in the United States Court of Appeals for the Sixth Circuit (Docket No. 14-3094) seeking judicial review of the Board's December 20,

documents on which it had relied. Allied added that its reading of those documents was corroborated by a verified statement from a former employee of Ohio Central. Ohio Central opposed reopening in a reply filed on March 12, 2014, arguing that the verified statement Allied included in its petition did not constitute “new evidence.” Ohio Central noted that it was not addressing the accuracy of the information or the implications Allied asserted based on that information, but instead only addressing whether Allied had met the procedural standards for reopening. On March 25, 2014, Allied filed a motion seeking leave to file a surreply, which Ohio Central opposed in its reply filed on April 4, 2014.

On August 6, 2014, the Board, through the Director of the Office of Proceedings, issued an order noting the unique circumstances of this proceeding and directing Ohio Central to submit a substantive reply to Allied’s arguments. Ohio Central then filed a supplemental reply on September 15, 2014. Allied filed a motion seeking leave to file supplemental comments on September 30, 2014, which Ohio Central opposed in a reply filed on October 20, 2014.

Subsequently, on April 23, 2015, Allied filed a motion seeking leave to clarify its arguments and relief sought. Ohio Central filed its reply opposing that motion on May 12, 2015.

#### PRELIMINARY MATTERS

As described above, Allied has filed a motion seeking leave to file a surreply, a motion seeking leave to file supplemental comments, and a motion seeking leave to clarify its arguments and relief sought. Ohio Central opposes all three motions.

Given the complexity of this proceeding and in the interest of developing a more complete record, we will accept Allied’s first two motions and Ohio Central’s responses to those motions into the record. We will, however, deny Allied’s third motion seeking leave to clarify its arguments and relief sought, as explained further below.

#### DISCUSSION AND CONCLUSIONS

A petition to reopen will be granted only if the petition presents new evidence, substantially changed circumstances, or a material error in the decision being challenged. 49 U.S.C. § 722(c); 49 C.F.R. § 1115.4. The alleged grounds for reopening must be sufficient to show that, if accepted, they would lead the Board to materially alter its prior decision. Allegheny Valley R.R.—Pet. for Declaratory Order, FD 35239, slip op. at 7 (STB served Apr. 19, 2013).

Allied’s petition to reopen challenges the Board’s conclusions in the December 2013 decision regarding Ohio Central’s authority to operate over both easements, referred to as the

---

2013 decision. That action is currently stayed pending the resolution of Allied’s petition to reopen.

LTV Tracks and the P&LE Tracks,<sup>3</sup> on the grounds of new evidence and material error. We will grant Allied's petition to reopen with respect to the LTV Tracks and deny its petition with respect to the P&LE Tracks, as discussed below.

### The LTV Tracks

#### *Regulatory Authority to Operate*

In its December 2013 decision, the Board concluded that one of Ohio Central's member railroads—the Mahoning Valley Railway Company (MVRV)—had regulatory authorization to operate over one of the easements, referred to as the LTV Tracks. The Board based its conclusion on a 1982 decision by the Interstate Commerce Commission (ICC) granting MVRV authority to operate over “a line of railroad consisting of approximately 18 miles of track owned or leased by [MVRV], with operations also over approximately 25 miles of track owned by industries being served in Mahoning County, OH.” Mahoning Valley Ry.—Operating a Line of R.R. in Mahoning Cnty., Ohio (MVRV—Operating), FD 29658, slip op. at 1 (Sub-No. 1) (ICC served Jan. 12, 1982). Because that language did not provide sufficient detail to determine whether the ICC's grant of authority extended to the LTV Tracks, the Board tried to locate a copy of the original MVRV application to determine which tracks MVRV had sought authority to operate. The Board, however, was unable to locate the application in the case file it inherited from the ICC. Lacking a clear record from the parties, the Board consulted other documents in the ICC case file, including the Return to Questionnaire, a document required by then-existing ICC regulations. Although none of these other documents specifically referred to the LTV Tracks, the Board construed them as showing that the ICC's 1982 decision had authorized MVRV to operate over the LTV Tracks.

Allied argues in its petition to reopen that the Board materially erred in finding that the ICC's 1982 grant of authority encompassed the LTV Tracks, and presents what it claims to be new evidence in support of this assertion. First, Allied argues that, in 1982, MVRV's tracks, which were north of Mahoning River, did not allow MVRV to physically reach the LTV Tracks, which at the time served as the intra-plant industrial tracks for Republic Steel Corporation's (Republic Steel) facility, now known as the Copperweld facility, south of the river. Allied argues that for MVRV to reach the LTV Tracks, the ICC would have had to have granted MVRV authority to operate over tracks owned by other railroads or authorize MVRV to construct its own tracks to gain access to Republic Steel's facilities, neither of which it did. Second, Allied argues that the shipper support statements attached to the Return to Questionnaire repeatedly indicated that granting MVRV's request for operating authority would allow MVRV to serve the Campbell Works facility north of the Mahoning River, but that no mention is made of the Republic Steel facility south of the river (Copperweld). In an attempt to corroborate both of these points, Allied attached the verified statement of William Spiker, a former employee of MVRV, as new evidence.

---

<sup>3</sup> For additional background on the tracks at issue, see the Board's December 2013 decision.

In its initial March 12, 2014 reply, Ohio Central argues that Allied did not meet the standards for reopening, though it only addresses Allied's claims pertaining to the new evidence prong of the Board's standard for reopening and not the material error prong. Specifically, Ohio Central argues that all of Allied's evidence was either available to the public or discoverable before or during the declaratory order proceeding. Because it claimed that this evidence should not be considered, Ohio Central stated that it would not address the accuracy of the evidence.

However, determining that the unique circumstances of this proceeding warranted a substantive response, the Board issued its August 2014 decision directing Ohio Central to provide a substantive response to Allied's petition. Ohio Central filed a supplemental reply on September 15, 2014. In that reply, Ohio Central does not defend the Board's reading of the Return to Questionnaire and other documents in the December 2013 decision, nor does it dispute Allied's reading of those documents. Indeed, Ohio Central appears to admit that the 1982 grant of authority did not include the LTV Tracks:

Based on the information provided by Allied, and on independent research, it appears that the Allied property at issue in this proceeding was former Republic Steel property and was not owned by Jones & Laughlin (the parent of MVRV's parent) in 1982 when MVRV was first authorized to operate as a common carrier railroad subject to the jurisdiction of the [ICC]. It appears that MVRV first began operations on the former Republic Steel property in 1984 following the merger of Republic Steel and Jones & Laughlin (and the subsequent renaming of the resulting company as LTV Steel [Company, Inc.]).<sup>4</sup>

Rather than defend the Board's conclusion that the 1982 decision granted MVRV authorization to operate the LTV Tracks, Ohio Central argues that "the Board should treat MVRV as being authorized to operate the LTV Tracks as main line tracks since at least 2001," when the Board authorized another company to control MVRV.<sup>5</sup>

Having reviewed the submissions, we conclude, first, that Allied has presented no new evidence that would materially alter the December 2013 decision. Mr. Spiker's verified statement does not constitute new evidence, as Allied identifies no reason why it could not have submitted his testimony prior to the December 2013 decision. See Norfolk S. Ry.—Pet. for Exemption—in Baltimore City & Baltimore Cnty., Md., AB 290 (Sub-No. 311X), slip op. at 5 (STB served Jan. 27, 2012).

But we also conclude that, even without considering that verified statement, the Board's December 2013 decision contained material error, and we will therefore reopen the proceeding. Allied has shown that the Board incorrectly interpreted certain documents, including the Return to Questionnaire, upon which the Board relied in its December 2013 decision. As Allied notes, the shipper letters attached to the Return to Questionnaire uniformly refer to MVRV's proposed

---

<sup>4</sup> Ohio Central Supplemental Reply (Sept. 15, 2014) at 4 (internal footnotes omitted).

<sup>5</sup> Id. at 7.

service as occurring at the Campbell Works on the north side of the river.<sup>6</sup> If MVRV had also sought authority to operate over the LTV Tracks to serve the Copperweld facility on the south side of the river in 1982, MVRV would likely have included a shipper letter supporting such service, or at least mentioned the presence of a shipper there that would benefit from such service, in the Return to Questionnaire. Moreover, Allied's interpretation of the Return to Questionnaire is supported by the fact that MVRV waited until 1990 to lease the LTV Tracks from LTV Steel Company, Inc.,<sup>7</sup> and obtain permission from Consolidated Rail Corp. (Conrail) to traverse its tracks between the Campbell Works and the LTV Tracks.<sup>8</sup> If MVRV had sought authority to operate over the LTV Tracks to serve the Copperweld facility in 1982, it seems unlikely that it would have waited eight years to lease the LTV Tracks and to secure the necessary permission from Conrail to reach them. MVRV has not provided a rationale for why it would have waited so long to do so. Finally, although not essential to this decision, both parties now appear to agree that MVRV did not obtain authority from the ICC to operate over the LTV Tracks in 1982.

Ohio Central also argues that the Board should "treat MVRV as being authorized to operate the LTV Tracks as main line tracks since at least 2001," when the Board authorized another company, Summit View, Inc., to control MVRV.<sup>9</sup> At that time, MVRV had been using the LTV Tracks as mainline tracks and "represented and warranted to Summit View, Inc., that MVRV had all necessary governmental authority to operate as it had been operating."<sup>10</sup> Although MVRV may have represented to its parent company that it had all necessary governmental authority to operate, that fact standing alone does not make it reasonable or appropriate for us to grant retroactive authority to MVRV.

We will therefore vacate and reverse the portion of the Board's December 2013 decision that concludes that MVRV received authority to operate over the LTV Tracks. On reopening, we now conclude that MVRV did not obtain regulatory authority to operate over the LTV Tracks. To provide common carrier service on the LTV Tracks going forward, MVRV must obtain Board authorization.

---

<sup>6</sup> Allied's presentation of its interpretation of the Return to Questionnaire will be permitted at this stage, because, as noted in the December 2013 decision, the parties may have been informed incorrectly that the Return to Questionnaire was absent from the official case file, or they may simply not have been aware of its existence, given that the agency has not required this type of document since 1981. In either case, the Board sua sponte located the Return to Questionnaire, and relied on it in the December 2013 decision, thus making it an issue for the first time in this case. Accordingly, Allied was entitled to present its interpretation of that document for the first time in a petition to reopen.

<sup>7</sup> Ohio Central Reply (Feb. 22, 2011) App. A at A-3 n.2.

<sup>8</sup> Id., App. A, Ex. A-8.

<sup>9</sup> Ohio Central Supplemental Reply (Sept. 15, 2014) at 7.

<sup>10</sup> Id. at 6.

*Classification of the Tracks*

In its petition for declaratory order, Allied asked the Board to declare that the LTV Tracks “are not main line tracks, but instead are spur, side, or industrial tracks.”<sup>11</sup> The Board, in its December 2013 decision, declined to determine the characteristics of the LTV Tracks, because Allied had failed to present a developed argument and because its conclusion that MVRY had received authorization to operate on the LTV Tracks made it unnecessary to decide whether the LTV Tracks were mainline or ancillary tracks, as preemption applied in either case.

Because we are now concluding that the 1982 decision did not give MVRY authority to operate over the LTV Tracks, it is no longer appropriate to defer consideration of the character of those tracks. MVRY argues that the LTV Tracks are mainline tracks. However, even if they are mainline tracks, MVRY’s failure to obtain regulatory authorization to operate over them under 49 U.S.C. § 10901 would deprive MVRY’s operations of federal preemption under 49 U.S.C. § 10501(b). See Suffolk & S. Rail Road—Lease & Operation Exemption—Sills Road Realty, LLC, FD 35036 (STB served Aug. 28, 2008). In contrast, if they are ancillary tracks within the meaning of 49 U.S.C. § 10906, no such authorization would be needed and the absence of such authorization would not deprive MVRY’s operations of the benefits of federal preemption. Port City Props. v. Union Pac. R.R., 518 F.3d 1186, 1188 (10th Cir. 2008); Green Mountain R.R. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005).

Allied has argued in some instances in the course of this proceeding that the LTV Tracks here are ancillary within the meaning of 49 U.S.C. § 10906.<sup>12</sup> However, on April 23, 2015, Allied filed a motion seeking leave to “clarify” its arguments, stating that it had conflated “private track” (over which the Board has no jurisdiction) with ancillary “excepted track” under 49 U.S.C. § 10906 (over which the Board has jurisdiction but no licensing authority). Allied cites to the Board’s recent decision in Pinelawn Cemetery—Petition for Declaratory Order, FD 35468 (STB served Apr. 21, 2015), which described the distinctions between the different types of track. Allied also states that it has consistently taken the position that the LTV Tracks are private tracks over which the Board lacks jurisdiction, in which case, there would be no preemption.

Although it does appear that, after the December 2013 decision, Allied, at times, has confused the concepts of private track and ancillary excepted track,<sup>13</sup> in its original petition

---

<sup>11</sup> Allied Petition (Nov. 2, 2009) at 10.

<sup>12</sup> See, e.g., Allied Pet. (Nov. 2, 2009) at 4; Allied Rebuttal Statement (Mar. 17, 2011) at 2; Allied Motion (Mar. 25, 2014) at 5.

<sup>13</sup> Allied Joint Supplemental Comments (Sept. 30, 2014) at 3 (“[C]onsistent with the provisions of 49 U.S.C. § 10906, the Board should find that it has no authority over operations conducted over the private, industrial tracks. . . .”); but see Allied Mot. (Mar. 25, 2014) at 8 (“[E]ven though the Board . . . may have exclusive jurisdiction over the ‘industrial’ and ‘spur’ tracks that are involved in this proceeding, the Board has no jurisdiction over their operation,” citing judicial discussion of 49 U.S.C. § 10906).

Allied referred to the LTV Tracks as “spur, side, or industrial” tracks, nearly echoing the language of 49 U.S.C. § 10906 (“spur, industrial . . . or side tracks”).<sup>14</sup> Allied has not demonstrated good cause, this late into the course of this proceeding, to recast its arguments. Allied claims that the Board’s decision in Pinelawn Cemetery supports its position that the LTV Tracks are private, but that decision simply re-articulated long-standing definitions of mainline track, ancillary track, and private track. For this reason, we will deny Allied’s motion to clarify its arguments.

Moreover, Allied has not shown that MVRV is using the LTV Tracks as private track. Private track is “non-jurisdictional track that is owned, constructed, and maintained by a shipper to serve its own facility. A person operating private track makes no holding out to serve other shippers.” Pinelawn Cemetery, FD 35468, slip op. at 2 n.5. Such track “is used exclusively by the track’s owner for movement of its own goods (either by utilizing its own equipment or by contracting for service) and for which there is no common carrier obligation to serve other shippers that might locate along the line.” B. Willis—Pet. for Declaratory Order, 6 S.T.B. 280, 281 (2002), aff’d sub nom., B. Willis v. STB, 51 Fed. App’x 321 (D.C. Cir. 2002). Here, the record does not support a finding that MVRV is using the LTV Tracks to provide freight rail service to its own facility, that MVRV does not hold out to serve shippers, or that MVRV uses the LTV Tracks exclusively for the movement of its own goods. On the contrary, MVRV is using the track to serve multiple shippers. Accordingly, the record does not demonstrate that MVRV is using the LTV Tracks as private track.

The LTV Tracks are thus either mainline or ancillary tracks. Ancillary tracks are described in § 10906 as “spur, industrial, team, switching, or side tracks,” though these terms are not defined in the statute. There is no single test for determining whether a particular track segment is a railroad line or is instead ancillary track. Rather, the Board and the courts have adopted a case-by-case, fact-specific approach to make this determination. See, e.g., Chicago & N.W. Transp. Co.—Aban. Exemption—in McHenry Cty., Ill., 3 I.C.C. 2d 366, 367-68 (1987), rev’d on other grounds sub nom. Ill. Commerce Comm’n v. ICC, 879 F.2d 917 (D.C. Cir. 1989).

In determining whether a particular track segment is railroad line or ancillary track, the agency and courts look primarily at the use of the track (the “use test”), and at the track’s physical characteristics. N.Y.C. Econ. Dev. Corp.—Pet. for Declaratory Order, FD 34429 (STB served July 15, 2004) (citing Battaglia Distrib. Co. v. Burlington N. R.R., FD 32058 (STB served June 27, 1997)). The Board examines whether the tracks are “intended to be used to carry through trains between points of shipment and delivery,” or “are merely incidental to, and not required for, a railroad’s service between points of shipment and delivery.” Nicholson v. ICC, 711 F.2d 364, 367 (D.C. Cir. 1983) (internal quotation marks omitted). Tracks that are used for activities that are incidental to the movement of trains are typically found to be ancillary under § 10906. N.Y.C. Econ. Dev. Corp.—Pet. for Declaratory Order, slip op. at 6 (citing Nicholson, 711 F.2d at 367-68).

---

<sup>14</sup> Allied Pet. (Nov. 2, 2009) at 4, 10.

Although the record contains some evidence that the LTV Tracks have been used for activities that might be indicative of ancillary track, we believe that, on balance, the record supports the conclusion that MVRVY uses the tracks as mainline. In particular, Ohio Central's own description of MVRVY's operations indicates that the operations are not incidental to the movement of trains. MVRVY used the tracks as part of the route for moving traffic from the CSX Transportation, Inc. interchange to customers on the Struthers Lead and from the Haselton Yard to customers west of the Center Street Bridge.<sup>15</sup> Ohio Central also states that MVRVY "move[s] traffic between the east side of the Center Street Bridge and the west side, both to and from customers (including LTV [Steel Company, Inc.]), [and] to move traffic to and from MVRVY's Class I connections with [CSX Transportation, Inc.] on the western end of its lines and with [Norfolk Southern Railway] . . . on the east side in Haselton Yard."<sup>16</sup> In other words, MVRVY uses the LTV Tracks as part of its route for moving traffic between points of shipment and delivery—specifically, between customers and interchanges with Class I carriers—which indicates that MVRVY uses the LTV Tracks as mainline.

The physical characteristics of the LTV Tracks are also consistent with the conclusion that they are mainline. Several specific characteristics have been found relevant in determining whether a track is mainline or ancillary under the physical characteristics test. These characteristics may include: the length of the track, how many shippers will be served, whether it is stub-ended, whether it was built to invade another railroad's territory, whether the shipper is located at the end of the track (indicating that the sole purpose of the track is to reach that shipper's facility rather than a broader market), whether the track was constructed with light-weight rail, whether or not there is regularly scheduled service, the condition of the track, and who owns and maintains the track. See N.Y.C. Econ. Dev. Corp.—Pet. for Declaratory Order, slip op. at 6-7; ParkSierra Corp.—Lease & Operation Exemption—S. Pac. Transp. Co., FD 34126, slip op. at 5 (STB served Dec. 26, 2001); see also Chi. SouthShore & S. Bend R.R.—Pet. for Declaratory Order—Status of Track at Hammond, Ind., FD 33522 (STB served Dec. 17, 1998).

Based on our review of the record, we conclude that the physical characteristics weigh in favor of a finding that this is mainline. Specifically, the following characteristics support the notion that the LTV Tracks are mainline tracks: MVRVY has used the LTV Tracks to serve

---

<sup>15</sup> Collins Dep. at 12-19, 73; Feichtenbiner 2010 Dep. at 33-36; Feichtenbiner 2009 Dep. at 67-68.

<sup>16</sup> Ohio Central Supplemental Reply (Sept. 15, 2014) at 8. See also Allied Opening Statement (Jan. 11, 2011), Ex. D, Collins Dep. at 34-35 (explaining that the LTV Tracks "are the main route and the only active route that we have to move from one end of our railroad to the other"); Ex. F, Feichtenbiner 2010 Dep. at 91 (describing the LTV Tracks as MVRVY's "thoroughfare" connecting it to Norfolk Southern Railway's Haselton Yard); & Ex. I, Feichtenbiner 2009 Dep. at 99 (describing how MVRVY receives cars from CSX Transportation, Inc., at an interchange location west of the LTV Tracks, and moves them across the LTV Tracks to points east.).

multiple customers;<sup>17</sup> the LTV Tracks connect to Norfolk Southern Railway on one end and to CSX Transportation, Inc., on the other end, and thus are not stub-ended; MVRVY is responsible for maintaining the LTV Tracks;<sup>18</sup> and MVRVY's 1990 lease of the LTV Tracks allowed MVRVY to expand its territory, as the lease (along with MVRVY's acquisition of trackage rights across the Haselton Yard) allowed MVRVY to access the Copperweld facility and other shippers, all west of the Center Street Bridge.<sup>19</sup>

The remaining characteristics are either not addressed by the record, or do not provide useful guidance. For example, the tracks appear to be fairly short, about four miles,<sup>20</sup> although not so short as to suggest strongly that they are ancillary. Chi. SouthShore & S. Bend R.R.—Status of Track at Hammond, Ind., slip op. at 6 (finding that although 1.8-mile length of track could “lead to the conclusion that the track is” mainline, the balance of factors favored the conclusion that the track is ancillary); ParkSierra Corp.—S. Pac. Transp. Co., slip op. at 6 (finding that 1.7-mile track is ancillary). In addition, after 2008, traffic volumes declined to the point where they were relatively light (about 30 cars per month),<sup>21</sup> but there is no evidence as to whether these cars were delivered on a scheduled or as-needed basis. There is also little evidence in the record as to whether the track is constructed with light-weight rail. Finally, the record indicates that some portions of the track are in poor condition,<sup>22</sup> which could support the notion that this is ancillary track. But even if the Board were to view some of these characteristics as supporting a conclusion that the LTV Tracks are ancillary tracks, they are outweighed by the other characteristics supporting mainline classification together with our conclusion under the use test that MVRVY operated the LTV Tracks as mainline. Accordingly, the Board finds the tracks to be mainline. Cf. Suffolk & S. Rail Road—Lease & Operation Exemption—Sills Road Realty, LLC, FD 35036, slip op. at 4 (STB served Dec. 20, 2007) (concluding that track was mainline because, although the track had some characteristics of ancillary track, the track was not ancillary to anything, as the railroad's closest mainline was hundreds of miles away).

---

<sup>17</sup> See Allied Opening Statement (Jan. 11, 2011), Ex. I, Feichtenbinder 2009 Dep. at 60, 65-67 (describing movement of traffic “from Norfolk Southern [Railway] to destinations” and “from CSX [Transportation, Inc.] here down to CASTLO Industrial Park,” and service of customers including MHF Logistics, Gateway Car Shop, CNC, and Impact Metals).

<sup>18</sup> See Ohio Central Reply (Feb. 22, 2011) at 4 (quoting LTV Easement, which MVRVY later acquired, as stating that LTV Steel Company, Inc., was responsible for maintaining and repairing LTV Tracks “at LTV's sole cost and expense”).

<sup>19</sup> Allied Opening Statement (Jan. 11, 2011), Ex. D., Collins Dep. at 14-16.

<sup>20</sup> See Ohio Central Reply (Feb. 22, 2011), App. A, Ex. A-11 at R 835 (listing length of track for #1 Main, Heckett track, #2 Main, #3 Main, #4 Main and 220 track).

<sup>21</sup> See Allied Opening Statement (Jan. 11, 2011), Ex. D, Collins Dep. at 16-18.

<sup>22</sup> Allied Opening Statement (Jan. 11, 2011), Ex. F, Feichtenbinder 2010 Dep. at 18-19 (describing the #3 Main track as impassable under the Center Street Bridge) & Ex. I, Feichtenbinder 2009 Dep. at 100-01 (same).

Because mainline operations require a license from the agency, and (as discussed above) MVRVY does not currently have authority to operate, its use of these tracks is subject to the application of state and local law and not entitled to preemption. See Suffolk & S. Rail Road—Sills Road Realty, LLC, FD 35036, slip op. at 3 (STB served Aug. 28, 2008) (activities that require a Board license but do not come within the scope of a license issued by the agency are subject to the application of state and local laws and not entitled to preemption). To the extent that some of the factors could suggest that portions of the LTV Tracks are ancillary, we emphasize that no single factor is dispositive and that, as a whole, the evidence suggests that the LTV Tracks are mainline. See Chi. SouthShore & S. Bend R.R.—Status of Track at Hammond, Ind., slip op. at 6-7.<sup>23</sup>

Therefore, we also vacate that portion of the December 2013 decision declining to address the characteristics of the LTV Tracks and now find that they are mainline tracks. To provide common carrier service on the LTV Tracks going forward, MVRVY must obtain Board authorization.

#### *Interpretation of the Easement Agreement*

As the Board stated in the December 2013 decision, agreements governed by state law are generally best interpreted by state courts. But in this case, the Ohio state court specifically asked the Board to determine whether the easement agreements allow Ohio Central to store or stage rail cars on the lines covered by the easements. In the December 2013 decision, the Board concluded that, based on the information before it, the easement agreements do not expressly prohibit Ohio Central from stopping, staging, or storing rail cars.

In its petition to reopen, Allied argues that the Board overlooked a provision of the LTV Easement requiring LTV Steel Company, Inc. (and now MVRVY, as LTV Steel Company, Inc.'s successor-in-interest) to relocate or vacate the easement to facilitate the development of Allied's property.<sup>24</sup> However, instead of explaining how this requirement bars MVRVY from stopping, staging, or storing rail cars, Allied argues that, given the absence of customers on or near the tracks and the tracks' alleged status as private industrial tracks, Allied is entitled to terminate the easement.<sup>25</sup> But that was not the question that the Ohio state court referred to us. The state court is better positioned than the Board to address a question of state property law, particularly here, where the parties have not fully briefed this issue. Accordingly, Allied has given the Board no reason to revisit the determination in the December 2013 decision that the LTV Easement agreement does not explicitly bar Ohio Central from stopping, storing, or staging railcars on the LTV Tracks.

---

<sup>23</sup> The parties did not raise, nor does the evidence and argument allow us to address, the question of whether some portions of the LTV Tracks might be ancillary and some portions mainline. We have evaluated these tracks as a whole, given that the arguments and evidence generally treat them as such.

<sup>24</sup> Allied Petition (Feb. 20, 2014) at 12-13.

<sup>25</sup> Id.

### The P&LE Tracks

In the December 2013 decision, the Board concluded that the ICC authorized the Ohio & Pennsylvania Railroad Company (OHPA), another Ohio Central member railroad, to operate over the other easement at issue in this case, referred to as the P&LE Tracks, in 1995. The Board further concluded that there was no evidence that OHPA ever sought authority to discontinue or abandon the authority it was granted in 1995. In support of that conclusion, the Board noted that when another entity sought abandonment and adverse discontinuance of OHPA's authority in 1999, it was only with respect to what is referred to as the Y&S Line and a one-mile segment near Negley, Ohio. See Ohio & Pa. R.R.—Adverse Discontinuance of Serv. Exemption—Between Youngstown, Ohio & Darlington, Pa., in Mahoning & Columbiana Cntys., Ohio & Beaver Cnty., Pa. (OHPA—Adverse Discontinuance), AB 555 (Sub-No. 2X) (STB served Sept. 3, 1999).

Allied argues that the Board's analysis of the P&LE Tracks in the December 2013 decision was flawed. Allied's argument appears to be based on the fact that the OHPA—Adverse Discontinuance decision includes a statement in a footnote that OHPA "agrees that its lease and service obligations should be discontinued," which, in Allied's view, indicates that OHPA's operating rights over the P&LE Tracks were also part of the discontinuance.<sup>26</sup> We disagree. As stated in the December 2013 decision, OHPA acquired by lease operating rights over both the Y&S Line and the P&LE Tracks. The OHPA—Adverse Discontinuance decision, however, specifically references only the Y&S Line and a one-mile segment near Negley, Ohio.<sup>27</sup> Moreover, the full text of the footnote cited by Allied makes it clear that the "lease and service obligations" refer to OHPA's lease with Railroad Ventures, Inc. (RVI) to provide service over the RVI-owned Y&S Line and the connecting one-mile segment, and not, as Allied claims, OHPA's 1995 lease with Pittsburgh & Lake Erie Railroad to operate the P&LE Tracks. Allied has shown neither new evidence nor material error in the Board's conclusion regarding the P&LE tracks. Allied's attempt to read the P&LE Tracks into the OHPA—Adverse Discontinuance decision is unavailing and does not satisfy the standard needed for the Board to reopen that portion of the December 2013 decision.

#### It is ordered:

1. Allied's April 23, 2015, motion seeking leave to clarify its arguments is denied. Allied's motions to supplement the record, and Ohio Central's responses thereto, will be granted and accepted into the record in the interest of having a complete record.

---

<sup>26</sup> Allied Pet. (Feb. 20, 2014) at 17.

<sup>27</sup> OHPA—Adverse Discontinuance, slip op. at 1 (discontinuance authority sought for "a 35.7-mile line from milepost 0.0 at Youngstown, OH, to milepost 35.7 at Darlington, PA, and a connecting 1-mile line segment near Negley, OH").

2. Allied's petition to reopen is granted in part and denied in part, as discussed above, and the Board's December 2013 decision in this proceeding is vacated and reversed in part, as described above.

3. A copy of this decision will be served on:

The Honorable Maureen Sweeney  
Ohio Court of Common Pleas Judge  
Court of Common Pleas—Mahoning County, Ohio  
120 Market Street  
Youngstown, OH 44503-1700

The Honorable Dennis Sarisky  
Ohio Court of Common Pleas Magistrate  
Court of Common Pleas—Mahoning County, Ohio  
120 Market Street  
Youngstown, OH 44503-1700

4. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.