40904 SERVICE DATE – LATE RELEASE JUNE 25, 2010
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SURFACE TRANSPORTATION BOARD

CORRECTED 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

Decided: June 23, 2010

By petition filed on November 2, 2009, Allied Erecting and Dismantling, Inc., and Allied Industrial Development Corporation (collectively Allied) request that the Board institute a declaratory order proceeding to resolve a dispute between Allied and Ohio Central Railroad System (Ohio Central)[1] regarding Ohio Central's use of 2 easements traversing Allied's property in eastern Ohio. As discussed below, a declaratory order proceeding is being instituted to resolve certain questions related to the dispute.

BACKGROUND

Allied filed its petition pursuant to a referral by the Court of Common Pleas for Mahoning County, Ohio in Allied Erecting & Dismantling, Inc. v. Ohio Central Railroad System (No. 2006 CV 00181 (Sept. 2, 2009)). Ohio Central filed its reply on November 23, 2009, and Allied submitted additional comments on December 8, 2009, to which Ohio Central responded

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* This decision corrects the decision served by late release on June 23, 2010. The June 23 decision incorrectly stated that Allied's opening statement is due September 6, 2010 (Labor Day). As set forth in this decision, Allied's opening statement is due September 7, 2010. Additionally, in this corrected decision, the bracketed references contained in the procedural schedule have been deleted. The June 23 decision remains unchanged in all other respects.

[1] According to Ohio Central, Ohio Central Railroad System is a trade name used for limited business purposes by certain commonly controlled railroads including the following named respondents in this matter: Ohio Central Railroad, Inc.; Ohio & Pennsylvania Railroad Company; Warren & Trumbull Railroad Company; Youngstown & Austintown Railroad, Inc.; Youngstown Belt Railroad Company; and Mahoning Valley Railway Company. These entities are collectively referred to as Ohio Central. Allied has also named Ohio Central's corporate parents, Summit View, Inc., and Genesee & Wyoming, Inc., as respondents in this matter, to which Ohio Central objects. This issue is addressed below.

on December 23, 2009.[2] Additionally, on November 20, 2009, Youngstown & Southern Railway Company (Y&S) filed a motion for leave to intervene in this proceeding, which is granted for the reasons explained below.

In its petition, in accordance with the court's instructions, Allied asks the Board to address the following issues related to the dispute:

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 STB.

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.

In addition to addressing the court's questions, Allied asks the Board to:

1. Address whether Ohio Central, its successors and assigns have any operating or other property rights over the tracks associated with the easements.

2. Establish that the tracks associated with one of the two easements, known as the LTV Easement, are not mainline tracks, but are instead spur, side, or industrial tracks.

Finally, Allied seeks to name Summit View, Inc. (Summit View), and Genesee & Wyoming, Inc. (GWI), as respondents in this matter, in addition to the 6 railroads using the Ohio Central trade name. In support of its position, Allied states in its petition that Summit View and GWI "are the owners, operators and corporate parents of the railroads which operate as the Ohio Central Railroad System, including the 'Ohio Central' defendants."[3]

In its reply, Ohio Central argues that Summit View and GWI should not be named as respondents in this matter. Ohio Central states that, while Summit View is its corporate parent and GWI is its indirect parent, neither is an "operator" of Ohio Central or its railroad properties. Ohio Central further states that Summit View and GWI are not parties to the court action. It must therefore be determined whether Summit View and GWI are proper parties to this proceeding.

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[2] Allied characterizes its December 8, 2009 submission as "Supplemental Petition for Declaratory Order," while Ohio Central characterizes its December 23, 2009 response as "Reply of Respondents to Supplemental Petition." Although each submission is technically a reply to a reply, which is normally impermissible under Board rules (49 C.F.R. § 1104.13(c)), both submissions will be accepted in order to establish a more complete record.

[3] Pet. for Declaratory Order 3.

In another action, Allied brought eviction proceedings against Ohio Central in the Court of Common Pleas for Mahoning County, Ohio, stemming from Ohio Central's alleged trespass on 2 other land parcels owned by Allied in Youngstown, Ohio. Ohio Central subsequently removed the matter to the U.S. District Court for the Northern District of Ohio, and Allied sought dismissal. In an order dated March 15, 2010, the district court remanded the case to the Court of Common Pleas and awarded attorney's fees to Allied. Allied Indus. Dev. Corp. v. Ohio Cent. R.R., Inc., No. 4:09-CV-01904 (N.D. Ohio Mar. 15, 2010). The district court subsequently denied Ohio Central's motion for reconsideration of the attorney's fees award. Allied Indus. Dev. Corp. v. Ohio Cent. R.R., Inc., No. 4:09-CV-01904 (N.D. Ohio Apr. 15, 2010).

In a motion filed with the Board on April 19, 2010, Allied seeks to introduce the district court's orders into the record. Allied states that it purchased the 2 land parcels from Gearmar Properties, Inc., on March 26, 2009, and that the eviction proceedings involve the same underlying factual controversy as the dispute over the easements. In an April 29, 2010 reply, Ohio Central argues that the eviction proceedings do not involve the same controversy and asks the Board to deny Allied's motion.

DISCUSSION

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue a declaratory order to terminate a controversy or remove uncertainty. In this case, there is a controversy on the present record regarding the Board's jurisdiction over the dispute. Under 49 U.S.C. § 10501(b), the Board's authority with respect to rail carrier transportation is exclusive, and state and local authority is preempted. There is also a controversy as to whether Ohio Central's use of the easements violates the easement agreements.

Here, the record contains insufficient information for the Board to determine: (1) if use of the disputed easements falls within the meaning of "transportation by rail carrier" under the Interstate Commerce Commission Termination Act of 1995 (ICCTA), thus preempting state and local law; and (2) if ICCTA preemption applies, whether Ohio Central's use of the easements is permissible and what relief Allied is entitled to if Ohio Central's use is impermissible. The record also lacks sufficient information for the Board to determine whether Summit View and GWI are proper parties to this proceeding. Therefore, pursuant to the Board's authority at 5 U.S.C. § 554(c) and 49 U.S.C. § 721, a declaratory order proceeding will be instituted.

In order to resolve these controversies, Allied and Ohio Central are directed to provide the following to the Board as part of their submissions in this proceeding:

1. Details regarding the physical locations of the track segments subject to the disputed easements, including the following: mileposts (if available); the number of tracks located on each segment; detailed maps depicting the location of each segment; photos (if available); and any other notable characteristics of the segments.

2. Descriptions of the manner in which the segments connect with the interstate rail network, including rail lines owned, leased, or operated by Ohio Central.

3. Descriptions of the nature of the activities that Ohio Central performs or performed on the segments, and the timeframes in which it has performed those activities.

4. Detailed explanations of whether and how Ohio Central's use of the segments relates to its interstate railroad operations.

5. Evidence of any authority issued by the Surface Transportation Board or the Interstate Commerce Commission with respect to the segments and/or easements.

6. Any other evidence in support of or against a Board finding of preemption under 49 U.S.C. § 10501(b) with respect to the segments and/or easements.

7. Evidence in support of or against naming Summit View and GWI as respondents in this proceeding.

This matter will be resolved pursuant to the modified procedure rules at 49 C.F.R. § 1112. Both Allied and Ohio Central have submitted, as part of their pleadings, proposed procedural schedules designed to allow time for the parties to address whether the Board has jurisdiction over the dispute. Additionally, Allied has proposed an extended schedule intended to provide time for the parties to address both the jurisdictional issue and the merits of the dispute. Although the non-extended (jurisdictional determination only) schedules submitted by Allied and Ohio Central are only intended to provide sufficient time for addressing the Board's jurisdiction, they also provide sufficient time for addressing the merits of the underlying dispute if necessary. Therefore, the jurisdiction-only schedules are used as the basis for the Board's own procedural schedule, which is set forth below.

Allied proposes a deadline for its opening statement 75 days following institution of a declaratory order proceeding. Because neither party will be adversely impacted by granting Allied's request, Allied's opening statement will be due 75 days following the institution of proceedings. To ensure that Ohio Central has adequate time to prepare its reply, it will be due 95 days following the institution of proceedings, or 20 days after Allied's opening statement is due. Allied's rebuttal will be due 105 days following the institution of proceedings, giving it 10 days to prepare it.

With respect to Y&S' motion for leave to intervene, Y&S states that, as the successor-in-interest to the original easement holder, Pittsburgh & Lake Erie Properties, Inc., and to the interests of Ohio & Pennsylvania Railroad Company, it has operating rights over 1 of the 2 easements in dispute. In accordance with 49 C.F.R. § 1112.4, because intervention by Y&S will not unduly disrupt the procedural schedule and will not unduly broaden the issues raised, the Board grants Y&S' motion for leave to intervene. Y&S is directed to file any pertinent information or comments with the Board no later than 95 days following the institution of proceedings.

Finally, with respect to Allied's motion to introduce into the record the March 15 and April 15, 2010 orders of the U.S. District Court for the Northern District of Ohio, the Board will address this matter in a subsequent decision.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. A declaratory order proceeding is instituted. This proceeding will be handled under the modified procedure on the basis of written statements submitted by the parties. All parties must comply with the Board's Rules of Practice, including 49 C.F.R. §§ 1112 and 1114.

2. Y&S' motion for leave to intervene is granted.

3. The procedural schedule is as follows:

September 7, 2010	Allied's opening statement is due.
September 27, 2010	Ohio Central's reply and Y&S' comments are due.
October 6, 2010	Allied's rebuttal is due.

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

5. 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

By the Board, Rachel D. Campbell, Director, Office of Proceedings.