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SERVICE DATE – DECEMBER 20, 2013

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:¹ A state court referred several questions to the Board related to an ongoing dispute between a property owner and a railroad regarding the railroad's use of two easements over the property owner's land. The property owner also asked the Board to answer certain other questions related to the dispute. In answering these questions, the Board concludes, based on the record before it, that the railroad has authority to operate, and that the Board's jurisdiction over rail transportation extends to the stopping and staging of rail cars. The Board also agrees with the state court that the easement agreements do not prohibit the stopping, staging, or storing of rail cars.

Decided: December 19, 2013

This case has its roots in 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).² In the lawsuit, 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. In response, Ohio Central contended, among other things, that Allied's lawsuit was preempted by the Board's exclusive jurisdiction over rail transportation and urged the state court to refer the dispute to the Board. The court directed the parties to refer three questions to the

¹ 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 Decisions, EP 696 (STB served Sept. 2, 2010).

² The "Ohio Central Railroad System" is a trade name used for limited business purposes by 11 commonly controlled railroads. The six carriers involved in the state court lawsuit, which are also named as respondents in this proceeding, are: 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. (Ohio Central Reply 1 n.1.) In addition to these six carriers, Allied also named Summit View, Inc. and Genesee & Wyoming, Inc. as respondents in this proceeding.

Board concerning the Board's jurisdiction, the easement agreements, and the availability of damages. Allied filed with the Board a petition for declaratory order, asking the Board to answer those questions and two others concerning the characteristics of, and Ohio Central's right to use, the tracks at issue.

As explained more fully below, in this decision we conclude, based on the record before us, that Ohio Central has authority to operate over the tracks at issue, and that the Board's jurisdiction over rail transportation extends to the stopping and staging of rail cars. The Board also agrees with the state court that the easement agreements in this case do not contain restrictions prohibiting the stopping, staging, or storing of rail cars.

BACKGROUND

The parties' dispute revolves around two easements related to industrial property that Allied owns in Youngstown, Ohio: the LTV Easement and the P&LE Easement. The record reveals the following:

The LTV Easement

In the 1980s, LTV Steel Company, Inc. (LTV)³ owned various properties in Mahoning County, Ohio, including a large tract of land on the south side of the Mahoning River in Youngstown, Ohio. This property is bisected by the Center Street Bridge, which spans the river, and is bounded on the north by the river. To the west of the Center Street Bridge, LTV owned a welded tube facility, which became known as the Copperweld facility, as well as tracks that served that facility and a rail yard known as the 270 Yard. At the western end of the property, the tracks in the 270 Yard converge to a single track used to interchange with CSX Transportation, Inc. (CSXT).⁴ The tracks on the west side of the bridge connect to tracks on the east side of the bridge, which in turn connect with the Haselton Yard, a rail yard just south of the Mahoning River owned by Norfolk Southern Railway Company (NSR).⁵ Through a merger with Youngstown Sheet & Tube Company, LTV also owned another tract of land on the north side of

³ LTV is a successor to Jones & Laughlin Steel Corporation (J&L). Although the corporate entity involved in many of the early transactions described herein was J&L, for simplicity, we will refer to LTV and its predecessors simply as "LTV." Additionally, we will refer to the current names of the rail carriers that are relevant to the properties at issue as opposed to their corporate predecessors.

⁴ Feichtenbiner 2010 Dep. at 33.

⁵ Id. at 32.

the Mahoning River, where its Campbell Works facility was located.⁶ The Campbell Works contained LTV's seamless tube facility and was also accessible by rail tracks.⁷

In 1981, LTV created a subsidiary called the Mahoning Valley Railway Company (MVRY). See Mahoning Valley Ry. & Cuyahoga Valley Ry.—Exemption, FD 29736 (ICC served Dec. 11, 1981). According to Ohio Central, LTV leased railroad tracks to MVRY to perform rail “switching” service⁸ at both the Copperweld facility and the Campbell Works.⁹ In 1981, MVRY applied to the Board's predecessor, the Interstate Commerce Commission (ICC), under 49 U.S.C. § 10901 for a certificate of public convenience and necessity to operate approximately 43 miles of track—18 miles of track owned or leased by MVRY, and 25 miles of track owned by industries in Mahoning County. MVRY proposed to provide “industrial freight and switching service” to industries “adjacent to the Mahoning River” in the cities of Youngstown, Campbell, and Struthers, Ohio.¹⁰ MVRY stated that its primary customer would be LTV, but that it expected to serve several other existing industries, as well as new industries to be located in a planned industrial park.¹¹ MVRY stated that it would connect with three other rail carriers: the Pittsburgh & Lake Erie Railroad (P&LE) in Youngstown and Struthers, and NSR and CSXT in Youngstown.¹² In 1982, the ICC granted MVRY's application. MVRY—Operating, FD 29658 (Sub-No. 1) (ICC served Jan. 13, 1982).

In the early 1990s, LTV sold to Allied the property on the south side of the river east of the Center Street Bridge.¹³ Allied is in the business of “[i]ndustrial contracting, industrial

⁶ See Youngstown Sheet & Tube Co.—Merger—Jones & Laughlin Steel Co.—Exemption, FD 29499 (ICC served Dec. 31, 1980); 46 Fed. Reg. 1786 (Jan. 7, 1981); see also Return to Questionnaire, Ex. A, in Mahoning Valley Ry.—Operating a Line of R.R. in Mahoning Cnty., Ohio (MVRY—Operating), FD 29658 (Sub-No. 1).

⁷ See Ohio Central Reply, App. A at A-3, App. A, Ex. A-8 (attached map).

⁸ In this context, “switching” refers to the initial or final movement of rail cars upon the terminal tracks of one railroad in aid of the line-haul movement over another railroad.

⁹ The record does not contain a copy of a lease from 1981, but it does contain a lease between LTV and MVRY from 1990, which the parties made effective retroactively to 1986. (Ohio Central Reply, App. A, Ex. A-11). The record also contains a lease from 1983 pertaining to tracks associated with the Campbell Works. (Ohio Central Reply, App. A, Ex. A-10).

¹⁰ See Return to Questionnaire at 2-4, in MVRY—Operating, FD 29658 (Sub-No. 1).

¹¹ Id. at 5.

¹² Id. at 4.

¹³ At some point, LTV sold the property west of the Center Street Bridge to Maverick Tubes, which sold it to Ohio Central in 2006. (Strawn Dep. at 83-84; Feichtenbiner 2009 Dep. at 49-50.) In 2007, Ohio Central sold two lots of that property to Gearmar Properties, Inc. (Gearmar), while retaining a third lot that contained its locomotive maintenance and repair facility. (Strawn Dep. at 108-09; Collins Dep. at 26.) In 2009, Gearmar sold to Allied the two lots that it had bought from Ohio Central. (Allied Opening Statement, Ex. Q.) Ohio Central, however, continued to occupy one of those lots under the impression that it had never sold the

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dismantling, [and] construction of facilities,”¹⁴ and uses a portion of the property as a marshaling yard where it performs fabricating work and modification work on structural steel.¹⁵ As part of the sale, Allied granted to LTV a perpetual, non-exclusive easement “to operate, use, maintain, repair, restore, replace and abandon” the tracks on that portion of the property (the LTV Tracks). At the time, LTV was operating the Copperweld facility, which required rail service.¹⁶ MVRV served LTV, another customer west of the Center Street Bridge, and CASTLO Industrial Park, located off of a P&LE-owned line to the east called the Struthers Lead.¹⁷

LTV later entered bankruptcy proceedings. In 2001, LTV assigned the rail easement to MVRV and sold MVRV to Summit View, Inc. (Summit View), which owns the group of railroads that comprise Ohio Central. In 2009, Genesee & Wyoming, Inc. (GWI) acquired control of Summit View.

Ohio Central has used the LTV Tracks in a variety of ways: as part of the route for moving traffic from the CSXT interchange to customers on the Struthers Lead and from the Haselton Yard to customers west of the Center Street Bridge; to stage rail cars for customers pending delivery; and to store rail cars for third parties.¹⁸ Allied’s plans for the property include: storing bulk materials; transloading cargo between rail cars and trucks; and relocating its scrap yard, currently located on a sloped area on the P&LE property (discussed below), to what it believes to be a more suitable location on the LTV property.¹⁹ According to Allied, Ohio Central’s stopping, storing, and staging of rail cars on the LTV Tracks interferes with those plans.²⁰

Beginning in about 2009, Ohio Central’s business slowed considerably due to economic conditions.²¹ As a result, Ohio Central ceased storing and staging railcars on the LTV Tracks.²² Ohio Central concedes that current business levels do not require the stopping or storing of rail

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parcel to Gearmar. Allied demanded that Ohio Central cease using the lot and ultimately sued to evict Ohio Central. At Ohio Central’s request, the court referred the matter to the Board, where it remains pending. See Allied Indus. Dev. Corp.—Pet. for Declaratory Order, FD 35477.

¹⁴ Ramun Dep. at 8.

¹⁵ Id. at 67-68.

¹⁶ Allied Opening Statement 5; Ohio Central Reply to Pet. ¶ 11.

¹⁷ Feichtenbiner 2010 Dep. at 98-100; Ohio Central Reply, App. A, Exs. A-8 & A-9.

¹⁸ Collins Dep. at 12-19, 73; Feichtenbiner 2010 Dep. at 33-36; Feichtenbiner 2009 Dep. at 67-68.

¹⁹ Ramun Dep. at 29, 65, 69, 73-74.

²⁰ Allied Opening Statement 4; Ramun Dep. at 73-74.

²¹ Feichtenbiner 2009 Dep. at 68.

²² Collins Dep. at 47, 52.

cars on any of the LTV Tracks, but states that it may have to do so in the future if traffic levels rise.²³

The P&LE Easement

Immediately to the south of the property formerly owned by LTV, P&LE owned a strip of land about 1.9 miles long containing another set of railroad tracks (the P&LE Tracks), including a main line and a siding.²⁴ To the west, the P&LE Tracks connect to a rail line known as the Youngstown & Southern line (Y&S Line).²⁵ The Y&S Line runs approximately 35.7 miles from milepost 0.00 in Youngstown to milepost 35.7 in Darlington, Pa.²⁶ To the east, the P&LE Tracks connect to a main line owned by NSR and the Struthers Lead.²⁷

In 1993, Allied purchased the P&LE property, including the tracks, and simultaneously granted to P&LE²⁸ a “perpetual, non-exclusive” railroad easement over the property.²⁹ The easement was for “the sole purpose of providing railroad operations thereover as a part of the operation of the former Youngstown & Southern Railway System.”³⁰

In 1995, the Ohio and Pennsylvania Railroad Company (OHPA), a part of the Ohio Central system, became the operator of the P&LE Tracks. P&LE leased the P&LE Tracks, the Struthers Lead, and the Y&S Line to OHPA for the purpose of conducting common carrier railroad operations.³¹ The ICC authorized OHPA to begin operations over the P&LE Tracks, the Struthers Lead, and the Y&S Line effective June 23, 1995. Ohio & Pa. R.R.—Lease & Operation Exemption—P&LE Props., Inc., FD 32711 (Sub-No. 1) (ICC served June 23, 1995).

²³ Ohio Central Reply 6.

²⁴ Strawn Dep. at 48-49.

²⁵ Actually, the P&LE Tracks connect to a short segment owned by the Ohio and Pennsylvania Railroad Company known as the Canfield Branch, which, in turn, connects to the Y&S Line. (Ohio Central Reply, App. B at B-2.) For the sake of simplicity, we ignore this detail in our discussion.

²⁶ Feichtenbiner 2010 Dep. at 16; Feichtenbiner 2009 Dep. at 24; Ohio Central Reply, App. C, Ex. C-1.

²⁷ Feichtenbiner 2010 Dep. at 76.

²⁸ By 1993, P&LE had changed its name to Pittsburgh & Lake Erie Properties, Inc. (Allied Rebuttal, Ex. B to Ramon Aff.) We refer to both entities as “P&LE.”

²⁹ The record contains two versions of the P&LE easement. One version, dated September 1993, refers to an easement over the “main line,” whereas the other version, dated November 1993, refers to an easement over the “rail line.” (Ohio Central Reply, Apps. B-1 & B-3). Allied and Ohio Central dispute which is the operative version. Given how we answer the questions referred to us, we need not resolve this dispute.

³⁰ Ohio Central Reply, App. B-1 at 1 & B-3 at 1.

³¹ Ohio Central Reply, App. B-5; Strawn Dep. at 58, 61-62, 67.

In November 1996, Railroad Ventures, Inc. (RVI) acquired the Y&S Line and also acquired trackage rights over 2.65 miles of track in Youngstown.³² Subsequently, in September 1999, the Board granted a petition by RVI to abandon the Y&S Line, and also to have OHPA relieved of its service obligations over the Y&S Line.³³ An offer of financial assistance under 49 U.S.C. § 10904 was filed by Columbiana County Port Authority (CCPA), and in December 1999, a new operator obtained Board authority to lease and operate the Y&S Line. Cent. Columbiana & Penn. Ry.—Lease & Operation Exemption—Columbiana Cnty. Port Auth., FD 33818 (STB served Dec. 23, 1999). In its notice of exemption, the new operator noted that it had reached an agreement to operate over a portion of a connecting three-mile segment between Youngstown and Struthers that was owned by OHPA. Also in December 1999, CCPA acquired any of P&LE's retained rights under the P&LE easement.³⁴ Eventually, the new operator went bankrupt, and, in 2004, OHPA agreed to replace it.³⁵ OHPA obtained Board authorization to operate the Y&S Line,³⁶ which it did from December 2004 to November 2006. In 2006, the Youngstown & Southeastern Railway Company (Y&SE) became the operator of the P&LE Tracks, the Struthers Lead, and the Y&S Line. Youngstown & S.E. Ry.—Lease & Operation Exemption—Lines of E. States R.R., FD 34962 (STB served Dec. 21, 2006).³⁷

Between 1995 and 1999, and again between 2004 and 2006, OHPA used the tracks covered by the P&LE easement to move rail traffic to customers located on the Y&S Line.³⁸ As

³² The history of these tracks is complicated by, among other things, the fact that RVI did not obtain the necessary authority from the Board prior to the acquisition. Retroactive authority was granted by the Board in 1997. R.R. Ventures, Inc.—Acquis. & Operation Exemption—Youngstown & S. R.R., FD 33385 (STB served Apr. 24, 1997).

³³ R.R. Ventures, Inc.—Aban. Exemption—Between Youngstown, Ohio & Darlington, Pa., in Mahoning & Columbiana Cntys., Ohio and Beaver Cnty., Pa., AB 556 (Sub-No. 2X) (STB served Sept. 3, 1999); Ohio & Pa. R.R.—Adverse Discontinuance of Serv. Exemption—Between Youngstown, Ohio & Darlington, Pa., in Mahoning & Columbiana Cntys., Ohio and Beaver Cnty., Pa., AB 555 (Sub-No. 2X) (STB served Sept. 3, 1999). The Board authorized the abandonment and discontinuance of service over the 35.7-mile Y&S Line, along with a one-mile segment near Negley, Ohio.

³⁴ Ohio Central Reply 9.

³⁵ Id., App. B-12.

³⁶ Ohio & Pa. R.R.—Acquis. & Operation Exemption—Rail Lines of Columbiana Port Auth. In Mahoning & Columbiana Cntys., Ohio & Beaver Cnty., Pa., FD 34632, slip op. at 1 (STB served Dec. 21, 2004); see also Strawn Dep. at 114-15.

³⁷ Recently, notices of exemption were filed for the purchase and assignment of operating rights relating to these lines, with the Y&SE continuing operations. Mule Sidetracks, LLC—Acquis. Exemption—Columbiana Cnty. Port Auth., FD 35773 (STB served Oct. 25, 2013); Youngstown & S.E. Ry.—Operation Exemption—Mule Sidetracks, LLC, FD 35774 (STB served Oct. 29, 2013).

³⁸ Feichtenbiner 2010 Dep. at 23, 67.

part of the through movement of traffic, OHPA used the P&LE Tracks for staging and stopping cars while awaiting further movement.³⁹ According to Ohio Central, the Y&S Line lacked available space to stage cars.⁴⁰

Allied's State Court Lawsuit

In 2005, Allied asked Ohio Central to cease storing and parking rail cars on Allied's property.⁴¹ Unsatisfied with Ohio Central's response, Allied filed a complaint against Ohio Central in 2006 in the Court of Common Pleas of Mahoning County, Ohio (the Ohio state court). Allied alleged, among other things, that Ohio Central had violated the LTV and the P&LE easements by stopping, storing, and staging rail cars on Allied's property, thereby interfering with Allied's ability to use the tracks.⁴² Allied's complaint raised four counts under Ohio law: (1) misuse/abuse/overburdening of non-exclusive railroad easements; (2) unreasonable use of easements; (3) unjust enrichment and deprivation of property; and (4) trespass. Allied sought declaratory and injunctive relief as well as monetary damages.⁴³

In 2009, Ohio Central asked the state court to dismiss Allied's lawsuit, claiming that Allied's state law claims were preempted by 49 U.S.C. § 10501(b), as amended by the ICC Termination Act of 1995, which gives the Board exclusive jurisdiction over rail transportation. In the alternative, Ohio Central asked the court to refer the case to the Board. The court referred 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.

Allied Erecting & Dismantling Co. v. Ohio Cent. R.R. Sys., No. 2006 CV 00181 (Sept. 2, 2009).

³⁹ Id. at 25-27.

⁴⁰ Ohio Central Reply 11.

⁴¹ Allied Pet., Ex. 3 to Ex. A.

⁴² Allied Pet., Ex. A at 5-10.

⁴³ Id.

This Proceeding

On November 2, 2009, Allied filed a petition for declaratory order with the Board in this docket, asking the Board to address the court's three questions and to make two additional determinations:

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

Ohio Central filed a reply on November 23, 2009, and Allied submitted additional comments on December 8, 2009, to which Ohio Central responded on December 23, 2009.⁴⁴ In a decision served on June 23, 2010 (corrected on June 25, 2010), the Board instituted a declaratory order proceeding under 5 U.S.C. § 554(e) and 49 U.S.C. § 721.

On January 11, 2011, Allied filed its opening statement. Allied argues that both the LTV and P&LE easements prohibit Ohio Central from stopping, storing, or staging cars on the tracks located on Allied's property. Because of Ohio Central's alleged "misuse" of the easements, Allied states that it has been unable to use the tracks for its own operations.⁴⁵ Because Ohio Central's operating rights are "non-exclusive" under the terms of both easements, Allied believes that it retains rights to use the property associated with the easements, and that these rights are frustrated when Ohio Central stores cars on tracks located on the easements.⁴⁶ Allied states that it is unaware of any Board-issued authority permitting Ohio Central to operate on either easement.⁴⁷

In its reply, filed on February 22, 2011, Ohio Central argues that neither easement agreement prevents it from stopping, storing, or staging rail cars on the easement tracks, and that it had authority to operate on both tracks at all relevant times.⁴⁸ According to Ohio Central, federal law preempts Allied's attempts to enforce what Allied believes are its state law property rights under the easements.⁴⁹ Ohio Central states that, while it does not currently use the LTV

⁴⁴ Allied characterized its December 8, 2009 submission as "Supplemental Petition for Declaratory Order," while Ohio Central characterized its December 23, 2009 response as "Reply of Respondents to Supplemental Petition." Although each submission was technically a reply to a reply, which is normally impermissible under 49 C.F.R. § 1104.13(c), both submissions were accepted in order to establish a more complete record.

⁴⁵ Allied Opening Statement 4.

⁴⁶ Id. at 23.

⁴⁷ Id. at 17.

⁴⁸ Ohio Central Reply 5, 8, 15.

⁴⁹ Id. at 2.

Tracks for stopping, storing, or staging, it has done so in the past and may need to do so in the future.⁵⁰ Ohio Central also notes that it has not used the P&LE Tracks since November 2006, when it says its rights to use the easement were transferred to another operator.⁵¹

In its rebuttal, filed on March 17, 2011, Allied argues that, to the extent that Ohio Central has or had common carrier rights to use the tracks at issue, those rights do not allow Ohio Central to use the tracks in a way that exceeds the scope of the easements.⁵² Moreover, Allied contends, the LTV Tracks are ancillary excepted industrial tracks within the meaning of 49 U.S.C. § 10906, rather than main line tracks, and, as such, there are no common carrier rights or obligations to operate over them.⁵³

PRELIMINARY MATTERS

Dismissal of Parties. Allied seeks to name Summit View and GWI as respondents in this matter, in addition to six of the 11 railroads using the Ohio Central trade name.⁵⁴ As noted above, Summit View is Ohio Central's corporate parent, while GWI is Summit View's corporate parent. Summit View and GWI are not parties to the state court action. Ohio Central maintains that Summit View, GWI, and all respondents other than MVRV and OHPA should be dismissed as parties because there is no evidence that any entity other than MVRV and OHPA claimed to have authority to operate over either of the easements at issue or that any other entities, in fact, operated there during the relevant time periods.⁵⁵ Nevertheless, Allied seeks to name Summit View and GWI so that these entities will be bound by our decision and "will be unable to avoid any declaratory order by using other third party railroads which they control."⁵⁶ With respect to the respondent railroads other than MVRV and OHPA, Allied argues that the Board should refrain from adjudicating whether they are proper parties here, as the state court did not refer that question to the Board.⁵⁷

We will dismiss Summit View and GWI from our proceeding. Neither entity is a rail carrier engaged in rail transportation; neither was named in Allied's state court complaint; and neither claims to have any rights under either the LTV easement agreement or the P&LE easement agreement. Allied has not made a case for ignoring the separate corporate existence of Summit View and GWI. Moreover, Allied's suggestion that Summit View and GWI may try to avoid any declaratory order we issue by using some other rail carrier under their control is

⁵⁰ Id. at 6, 18 n.18, App. A-4, App. B-2.

⁵¹ Id. at 10, 15.

⁵² Allied Rebuttal 3-4.

⁵³ Id. at 2.

⁵⁴ See supra n.2.

⁵⁵ Ohio Central Reply 1 n.2, 11-12.

⁵⁶ Allied Opening Statement 18.

⁵⁷ Allied Rebuttal 10-12.

unpersuasive, given that no such carrier is alleged to have ICC or Board authority to operate over either the LTV Tracks or the P&LE Tracks.

We will not, however, dismiss any of the respondent rail carriers. All were named in the Ohio state court action, and, in that action, Allied alleged that Ohio Central, defined to include all six Respondent carriers named here, held, stored, and stopped rail cars in violation of the easements. Therefore, the six Respondent rail carriers are properly part of this proceeding.⁵⁸

Y&SE Withdrawal. On November 20, 2009, Y&SE filed a motion for leave to intervene in this proceeding. In our June 23, 2010 decision, the Board granted this motion because, as the successor-in-interest to P&LE, Y&SE appeared to retain operating rights on the P&LE easement. On March 1, 2011, Y&SE filed a letter with the Board, seeking permission to withdraw from this proceeding because it believes that its interest in this dispute has been satisfied. Y&SE asks, however, that it remain on the Board's service list in this matter. Both of Y&SE's requests will be granted.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. See Boston & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Intercity Transp. Co. v. U.S., 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C. 2d 675 (1989). There are five questions before us relating to the dispute between Allied and Ohio Central. The three issues referred to the Board by the Ohio state court concern: (1) the Board's jurisdiction over Ohio Central's stopping, storing, and staging of rail cars on the LTV and P&LE Tracks; (2) whether the easement agreements allow the stopping, storing, and staging of rail cars; and (3) the availability of damages. Additionally, Allied asked the Board to determine: (4) whether Ohio Central ever obtained regulatory authority to operate over the tracks; and (5) the characteristics of the LTV Tracks. Although the parties make certain other arguments as well in their submissions, this decision is limited to the five questions posed here. We begin our analysis by addressing Allied's questions, because, if Ohio Central never obtained the regulatory authority needed to operate over the tracks, then none of Allied's state law claims against Ohio Central could be federally preempted. See Suffolk & S. Rail Road, LLC—Lease and Operation Exemption—Sills Road Realty, LLC, FD 35036, slip op. at 1 n.1 (STB served Aug. 28, 2008) (holding that federal preemption did not apply to rail carrier's proposed construction activities before carrier received Board construction authorization).

⁵⁸ Additionally, on April 19, 2010, prior to the institution of this declaratory order proceeding, Allied filed a motion with the Board seeking to supplement its petition for declaratory order by introducing two court decisions from a separate eviction proceeding. Ohio Central opposed Allied's request. In the order instituting this proceeding, the Board stated that it would address this matter in a subsequent decision. The court decisions from the separate eviction proceeding are not relevant to the issues before us, and in any event, Allied's petition to institute a declaratory order proceeding was granted, rendering its motion to supplement moot. Therefore, we will deny Allied's motion to supplement.

Allied's Questions

1. Does Ohio Central have any operating or other property rights over the tracks associated with the easements?⁵⁹

Board authorization is required either for a noncarrier to acquire a line of railroad or for an existing carrier to acquire an additional line of railroad. 49 U.S.C. §§ 10901(a), 10902(a), & 11323(a)(2). Similarly, Board authorization is required before a carrier may abandon a line of railroad or discontinue service over any part of its rail lines. 49 U.S.C. § 10903. Generally, however, no Board authorization is required to acquire or abandon ancillary rail facilities, such as spur, industrial or side tracks. 49 U.S.C. § 10906; but see Effingham R.R.—Pet. for Declaratory Order—Constr. at Effingham, Ill., 2 S.T.B. 606, 609-10 (1997) (Board has licensing authority over proposal by new carrier to construct and operate over § 10906 track that would constitute its entire operation).

In its petition, Allied questioned whether Ohio Central had the necessary regulatory authorization to acquire and operate the LTV or P&LE Tracks. As such, when the Board instituted this declaratory order proceeding, it directed the parties to submit “[e]vidence of any authority issued by the [Board] or the [ICC] with respect to the segments and/or easements” at issue. Allied Erecting & Dismantling, Inc.—Pet. for Declaratory Order—Rail Easements in Mahoning Cnty., Ohio, FD 35316, slip op. at 4 (STB served June 25, 2010). In response, Ohio Central points to several ICC and STB decisions, which it says gave MVRVY and OHPA the required regulatory authority to operate over the LTV and P&LE Tracks, respectively. Allied disputes that the decisions granted MVRVY or OHPA any operating rights over either set of tracks.

The LTV Tracks

For the LTV Tracks, Ohio Central points to a 1982 decision in which the ICC granted MVRVY authority under 49 U.S.C. § 10901 to operate over “a line of railroad consisting of approximately 18 miles of track owned or leased by [MVRVY], with operations also over approximately 25 miles of track owned by industries in Mahoning County, OH.” MVRVY—Operating, slip op. at 1.⁶⁰ Ohio Central contends that the LTV Tracks were among the tracks for

⁵⁹ To the extent Allied asks the Board to determine whether Ohio Central has any state law property rights associated with those tracks, we defer to the state court to answer that question.

⁶⁰ Because Ohio Central believed that the original ICC decision granting MVRVY operating authority was unavailable, it refers only to a Federal Register notice dated August 6, 1981, announcing MVRVY’s application. However, the ICC decision granting MVRVY’s application, served on January 13, 1982, is available to the public in the official case file located in the Board’s library, and the Board will provide that decision to the parties upon request. Both the January 13, 1982 decision and the August 6, 1981 notice describe MVRVY as seeking

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which MVRVY received authority.⁶¹ Allied disputes that the ICC's decision permitted MVRVY to operate over the LTV easement tracks, noting that the decision "makes no reference whatsoever to the LTV [T]racks or the underlying property."⁶²

As Ohio Central notes, the original application, which presumably described the lines over which MVRVY sought ICC operating authority,⁶³ is missing from the official file the Board inherited from the ICC. Because Ohio Central did not submit a copy of the application from its own records, Board staff attempted to locate a copy of the application from the National Archives and Records Administration and the official archives of the State of Ohio.⁶⁴ When these efforts proved unsuccessful, we examined documents in the original ICC file, one of which was a Return to Questionnaire submitted by MVRVY. The Return to Questionnaire was a document required by then-existing ICC regulations.⁶⁵ At the time, an applicant was required to first "file an abbreviated application" and then, after publication of a notice of the filing, to file a "return to questionnaire" which include[d] detailed information about the proposal." Application Procedures for a Certificate to Construct, Acquire or Operate R.R. Lines, 365 I.C.C. 236, 239 (1981). We also examined other ICC proceedings involving MVRVY from the early 1980s to see if they contained any relevant information about the LTV Tracks at issue here.

MVRVY indicated in its Return to Questionnaire that it planned to operate in portions of Youngstown, Campbell, and Struthers, serving industrial property adjacent to the Mahoning River.⁶⁶ There is evidence to indicate that MVRVY operated both north and south of the Mahoning River: MVRVY's Return to Questionnaire stated that it planned to serve LTV and

(continued . . .)

authority over 18 miles of track owned or leased by MVRVY, with operations over an additional 25 miles of track owned by local industries.

⁶¹ Ohio Central Reply, App. A at A-3.

⁶² Allied Rebuttal 4.

⁶³ Under ICC regulations in effect at the time, MVRVY's application was required to include "[t]he route and termini of the line," 49 C.F.R. § 1120.1(f) (1981), and to be "accompanied by [a] map drawn to scale, showing fully the geographic situation of the lines Towns, villages, large rivers . . . should be shown, at least near the route," 49 C.F.R. § 1120.1(l) (1981).

⁶⁴ ICC regulations would have required MVRVY to serve a copy of its 1981 application on the Governor of Ohio and the Ohio Public Utilities Commission. 49 C.F.R. § 1120.2(c) (1981).

⁶⁵ 49 C.F.R. § 1120.5 & 1120.6 (1981). It is unclear whether the parties were told that that document was not in the official case file located in the Board's library, or whether they simply were not aware of its existence, given that the agency has not required this type of document since 1981. In either event, the Return to Questionnaire is available to the public in the official case file located in the Board's library. The Board will provide this document to the parties upon request.

⁶⁶ Return to Questionnaire at 3-4, in MVRVY—Operating, FD 29658 (Sub-No. 1).

certain industries operating at or associated with the Campbell Works,⁶⁷ and its articles of incorporation indicate that MVRVY intended to operate “East of Center Street in the City of Youngstown . . . and running thence in a Southeasterly direction to a point at the Eastern end of [LTV’s] panther run pipe storage facility on the South bank of the Mahoning River.”⁶⁸ MVRVY connected to the P&LE at “several locations in and around various [LTV] facilities in the cities of Youngstown, Campbell and Struthers, Ohio.”⁶⁹

None of these filings and statements specifically refers to the LTV Tracks. And although MVRVY’s application may have been able to definitively settle the question of whether MVRVY—Operating covers the LTV Tracks, Board staff has been unable to locate it and the parties have been unable to provide it. The record we have, however, supports the conclusion that MVRVY sought and obtained authority to operate over 43 miles of track in the “small area along the Mahoning River”⁷⁰ where the LTV Tracks are located. Moreover, there is no dispute that MVRVY has continuously operated in this area since it received authority to operate from the ICC in 1982. In these circumstances, we conclude that the LTV Tracks are encompassed within the ICC’s grant of operating authority that MVRVY received in 1982 in MVRVY—Operating.

The P&LE Tracks

Ohio Central contends that the ICC and the Board authorized OHPA to operate on the P&LE Tracks between 1995 and 1999, and again between 2004 and 2006, in decisions issued in 1995 and 2004, respectively. We agree that the ICC authorized OHPA to operate over the P&LE Tracks by decision served June 23, 1995. See Ohio & Pa. R.R.—Lease & Operation Exemption—P&LE Props., Inc., FD 32711 (Sub-No. 1) (ICC served June 23, 1995). That decision refers to a request by OHPA for permission to acquire by lease “39.24 miles of rail line between milepost 0.0, at Youngstown, OH, and milepost 35.7, at Darlington, PA, including [a] short segment[] of line in Youngstown (1.9 miles).” Id. (emphasis added). We are satisfied that the reference to the 1.9 miles of track in Youngstown was to the P&LE Tracks, which run 1.9 miles between the Y&S Line to the west and the NSR main line.⁷¹

Based on the current record, however, we can find no evidence that OHPA ever sought authority to discontinue or abandon the authority it was granted in 1995. When RVI sought abandonment and adverse discontinuance of OHPA’s authority in 1999, it was only with respect to the Y&S Line and a one-mile segment near Negley, Ohio.⁷² We are not aware of any decision

⁶⁷ Id. at 5, Exs. E, F, I, J, K.

⁶⁸ MVRVY filing received Sept. 8, 1981, in Mahoning Valley Ry., FD 29735.

⁶⁹ Comments of the P&LE received Sept. 2, 1981, in Mahoning Valley Ry.—Operation of a Line of R.R. in Mahoning Cnty., Ohio, FD 29658 (Sub-No. 1).

⁷⁰ Petition for Exemption received Sept. 8, 1981, in Mahoning Valley Ry.—Exemption, FD 29736.

⁷¹ Strawn Dep. at 48-49.

⁷² See supra n.33.

granting abandonment or discontinuance authority to OHPA over the P&LE Tracks. And as the Board has reminded parties in other settings, “once [an] operator obtains Board authorization to provide common carrier rail service over a line, the common carrier obligation continues . . . unless and until the Board grants the appropriate discontinuance or abandonment authority.” Juniata Valley R.R.—Operation Exemption—SEDA-COG Joint Rail Auth., FD 35469, slip op. at 1 n.1 (STB served Mar. 11, 2011) (citing 49 U.S.C. § 10903).

As Ohio Central points out, OHPA did receive Board authorization in 2004 “to acquire (by lease) approximately 36 miles of rail line . . . between milepost 0.0 at or near Youngstown, OH, and milepost 35.7 at or near Darlington, PA.” Ohio & Penn. R.R.—Rail Lines of Columbiana Port Auth. In Mahoning & Columbian Cntys., Ohio & Beaver Cnty., Pa., FD 34632, slip op. at 1. In other words, OHPA only sought authority to operate on the Y&S Line, perhaps because it understood that it already had authority to operate over the P&LE Tracks. This is confirmed by the OHPA’s notice of exemption in that proceeding, in which it stated that it “presently owns and operates approximately 2.65 miles of trackage and related facilities in Youngstown, Ohio, where its tracks connect with the [Y&S] Line.” Verified Notice of Exemption at 4, in Ohio & Penn. R.R.—Rail Lines of Columbiana Port Auth. In Mahoning & Columbian Cntys., Ohio & Beaver Cnty., Pa., FD 34632.

Ohio Central appears to believe that OHPA’s authority with respect to the P&LE Tracks terminated in 2006.⁷³ Again, however, we are not aware of any decision granting abandonment or discontinuance authority to OHPA over the P&LE Tracks, either in 1999 or 2006. Thus, we conclude that OHPA had, and continues to have, regulatory authority to operate over the P&LE Tracks.

2. Are the LTV Tracks main line tracks, or ancillary, spur, side, or industrial tracks within the meaning of 49 U.S.C. § 10906?

We decline to answer this question because Allied failed to present a developed argument in this proceeding concerning the characteristics of the tracks. Moreover, given our conclusion above that the LTV Tracks were encompassed in the ICC’s 1982 grant of authority to MVRV, and our determination below that there are no restrictions on stopping and storing rail cars in the easement agreements, it is not necessary to decide whether the LTV Tracks are mainline tracks or ancillary spur tracks.⁷⁴

⁷³ Ohio Central Reply to Pet. for Declaratory Order 7, ¶36.

⁷⁴ We note that the Board has exclusive jurisdiction over ancillary, spur, side, or industrial tracks within the meaning of 49 U.S.C. § 10906 even if it does not actively regulate those tracks. See 49 U.S.C. § 10501(b)(2) (specifically providing that the Board’s jurisdiction over spur, industrial, team, switching, or side tracks or facilities is exclusive); Port City Props. v. Union Pac. R.R., 518 F.3d 1186, 1188 (10th Cir. 2008) (jurisdiction over spur, industrial, team, switching, and side tracks rests solely with the Board).

Questions Referred by the Ohio State Court

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.**

In its order referring this question to the Board, the Ohio state court noted in its decision that “[n]ot all railroad ‘operations’ are conducted while the train is continuously moving . . .,” Order at 5 (citation omitted); nevertheless, it referred this question to the Board because it pertained to the standards, practices, and requirements of rail carriers.

The Board’s jurisdiction extends to “transportation by rail carrier.” 49 U.S.C. § 10501(a)(1). “Transportation” is broadly defined to include “a locomotive, car, vehicle, vessel, . . . property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use,” 49 U.S.C. § 10102(9)(A), as well as “services related to that movement, including receipt, delivery, elevation, transfer in transit, . . . storage, handling, and interchange of passengers and property,” 49 U.S.C. § 10102(9)(B).

A train or rail car might be required to stop during a movement for a variety of reasons, including loading, unloading, staging, interchanging, refueling, and complying with signals, among others. When conducting these activities during a movement, a rail carrier is indisputably performing transportation subject to our jurisdiction. With respect to staging—the temporary holding of trains or rail cars at a location (e.g., a staging yard) pending their release for further movement (e.g., into a terminal facility)—the holding and the release of cars to continue their movement likewise fall under the broad definition of “transportation.” Moreover, as discussed above, OHPA is a rail carrier and, from 1995 onward, an authorized provider of common carrier rail service over the P&LE Tracks.⁷⁵ MVRVY is a rail carrier and an authorized provider of common carrier rail service over the LTV Tracks. Therefore, as both easement tracks are within the national rail system, Ohio Central’s use of the tracks for staging and stopping of rail cars during their movement is within the jurisdiction of the Board.

With respect to storage, the answer is more complicated. The Board has said that the storage of private cars on private track by a non-carrier is not within our jurisdiction. See N. Am. Freight Car. Ass’n v. BNSF Ry., NOR 42060 (Sub-No. 1), slip op. at 15 (STB served Jan. 26, 2007), aff’d, 529 F.3d 1166 (D.C. Cir. 2008). But there is a significant difference between that situation and circumstances that do not involve private cars on private track—for example, the storage of carrier-owned cars on regulated track by a carrier. Here, the car storage issue was among those that the court referred to the Board, and the Board specifically directed the parties to describe the nature of the activities conducted by Ohio Central on the easement tracks and how those activities relate to interstate railroad operations. Despite all of this, the parties did not address where on the spectrum of car storage practices the defendants’ practices

⁷⁵ See Ohio Central Reply, App. A, A-2, A-3; Reply, App. B, B-2.

lie, nor the legal consequences of those practices. Therefore, we are unable to address this particular issue.

2. Whether the easement agreements allow Ohio Central to store or stage railcars on the tracks associated with the easements.

The Board has previously stated that agreements governed by state law are generally best interpreted by state courts. See MVC Transp., LLC—Acquis. Exemption—P&LE Props., Inc., FD 34462 et al., slip op. at 6 (STB served Oct. 20, 2004); Lackawanna Cnty. R.R. Auth.—Acquis. Exemption—F&L Realty, Inc., FD 33905 et al., slip op. at 6 (STB served Oct. 22, 2001). The Ohio state court, however, 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 its order referring its questions to the Board, the Ohio state court stated that:

[it] has reviewed the easements agreements, however, and they do not expressly prohibit the Defendants from stopping or storing cars on the lines. To the contrary, the easements expressly allow the Defendants to “operate” and “use” the LTV lines and use the P&LE lines for “railroad operations”. Moreover, “[n]ot all railroad ‘operations’ are conducted while the train is continuously moving....”

Order at 5 (citation omitted). Like the Ohio state court, the Board looked to the language of the easement agreements. After reviewing the agreements and the other evidence and arguments submitted, we agree with the reasoning offered by the Ohio state court and find, based on the information before us, that neither easement agreement expressly prohibits Ohio Central from stopping, staging, or storing cars on the lines.

Although not specifically referred to us in this proceeding, we will also briefly comment on two matters related to the use of and rights over the easement tracks. First, the parties contest whether Allied has the right under state law to operate on the tracks at issue in this case.⁷⁶ We do not decide that issue. However, we note that both Ohio Central and Allied could have the right to operate trains over the tracks, as a grant of ICC or STB authority to operate as a common carrier does not mean that the common carrier necessarily has exclusive use of the rail line. As the Board has previously found, in certain circumstances a noncarrier may conduct private carriage on a common carrier rail line where the private carrier is transporting its own goods, not holding itself out to provide service for compensation, and not unduly interfering with the common carrier’s operations on the line. See S.D. Warren Co.—Acquis. & Operation Exemption—Me. Cen. R.R., FD 34133, slip op. at 2 (STB served Sept. 30, 2002); see also V&S Ry.—Pet. for Declaratory Order—R.R. Operations in Hutchinson, Kan., FD 35459, slip op at 9-12 (STB served July 12, 2012). In some cases, the terms of private carriage on common carrier track are outlined through consensual agreement between the common carrier and the private party.

⁷⁶ Allied Opening Statement 4; Ohio Central Reply 8.

Second, in its pleadings, Allied claims that Ohio Central's rights under the LTV easement have been terminated pursuant to the state law "merger by ownership" doctrine.⁷⁷ Allied asks the Board to declare that the Ohio state court is the proper forum to decide whether the "merger by ownership" doctrine is applicable in this case. We do not address this state-law argument here, but instead underscore the long-standing principle that, once an operator obtains agency authorization to provide common carrier rail service over a line, the common carrier obligation continues unless and until the Board grants the appropriate discontinuance or abandonment authority. Juniata Valley R.R., slip op. at 1 n.1. Once a party has incurred a common carrier obligation under 49 U.S.C. § 11101(a) to provide rail service on a particular line, that party may not relinquish its common carrier obligation simply by contracting away the state law property rights that it possesses (to the degree that they are necessary to provide the authorized rail service), as doing so would amount to an unauthorized abandonment or discontinuance under federal law.

3. What damages are available to Allied if Ohio Central has violated the easement agreements.

The Board may only award damages where the Interstate Commerce Act establishes its authority to do so. The Act generally does not authorize the Board to award damages in connection with matters that are governed by state law, such as easement or contract disputes. See 49 U.S.C. § 11704 (authorizing Board to award damages when a rail carrier has violated the Interstate Commerce Act).

It is ordered:

1. Summit View and GWI are dismissed from this proceeding. Ohio Central's request to dismiss all respondents other than MVRV and OHPA is denied.
2. Y&SE's request seeking permission to withdraw from this proceeding is granted. As requested, however, Y&SE will remain on the Board's service list in this proceeding.
3. Allied's motion to supplement the petition for declaratory order is denied as moot.
4. The request for a declaratory order is granted to the extent specified in this decision. As described in this decision, the Board concludes, based on the record before it, that the railroad has authority to operate, and that the Board's jurisdiction over rail transportation extends to the stopping and staging of rail cars. The Board also agrees with the state court that the easement agreements do not prohibit the stopping, staging, or storing of rail cars.
5. A copy of this decision will be served on:

The Honorable Maureen Sweeney
Ohio Court of Common Pleas Judge

⁷⁷ Allied Opening Statement 8, 27-28.

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

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

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