

Before the
SURFACE TRANSPORTATION BOARD

ENTERED
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April 23, 2015
Part of
Public Record

STB Docket No. FD 35316

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

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

Petitioners, Allied Erecting and Dismantling, Inc. and Allied Industrial Development Corporation (jointly referred to hereinafter as “Allied”), in reliance on the Board’s decision in *Pinelawn Cemetery—Petition for Declaratory Order*, FD 35468 (STB served April 21, 2015), respectfully request permission to clarify one aspect of their legal position in this pending proceeding. As a review of the Joint Supplemental Comments of Allied Erecting and Dismantling, Inc. and Allied Industrial Development Corporation, filed September 30, 2014, will demonstrate, arguments regarding Allied’s “private track” (over which the Board has no jurisdiction) were conflated with “excepted track” under 49 U.S.C. § 10906, over which the Board has jurisdiction, but lacks any statutory authority over the construction, acquisition, operation, or abandonment thereof.

In *Pinelawn*, the Board clearly articulated the distinctions between three categories of track. As the Board explained (slip op. at 6), it “has exclusive jurisdiction over rail lines over which railroads provide point-to-point ‘common

carrier' line-haul service to shippers" pursuant to authority granted by the Board or its predecessor, the Interstate Commerce Commission ("ICC"). Certain other track, known as "excepted track," includes tracks covered by 49 U.S.C. § 10906, such as "spur, industrial, team, switching, or side tracks", that are "statutorily excepted from the entry and exit licensing requirements of 49 U.S.C. §§ 10901-10905." (*Id.*) Excepted track, similar to rail lines, are part of the national rail system.

As the Board also explained in *Pinelawn*:

certain rail track, although used to facilitate the movement of rail cars, is neither rail line nor excepted track. Such track, which is known as *private 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 C.P.A., Inc.*, 6 S.T.B. at 281. In contrast to railroad lines and excepted track, the Board has *no jurisdiction* over private track, and it is generally subject to state and local regulation.

Slip op. at 7 (emphases added).

As a review of the record in this proceeding will confirm, LTV contracted with Mahoning Valley Railroad ("MVRV"), which was a corporate subsidiary to move its own goods. Following Allied's acquisition of LTV's facilities east of the Center Street Bridge, Allied granted an easement to LTV that permitted MVRV to continue operations for LTV. However, at no time did MVRV seek authority from the ICC or the Board to perform any common carrier rail operations over the tracks that are at issue herein.

Allied has consistently taken the position that the extensive trackage within the former facilities of Republic Steel located south of the Mahoning River consists solely of **private tracks**. As such, those tracks were **never** subject to the jurisdiction of the ICC. Nothing changed when Republic Steel was merged into LTV Steel or when LTV Steel subsequently sold the entire network of private tracks to Allied Erecting in 1992. Therefore, Allied's private tracks were not then, and are not today, subject to the Board's jurisdiction.

Consistent with the Board's explanation in *Pinelawn*, it is wholly irrelevant that Republic and its successors (including Allied) have labeled individual tracks as main, spur, industrial, switching or otherwise. As a matter of law, those private tracks were *never* brought within the jurisdiction of the ICC or the Board. Therefore, it is inappropriate to treat them either as "rail lines" or as "excepted tracks" that are in any manner subject to the Board's jurisdiction.

Throughout this proceeding, and particularly in the Joint Supplemental Comments, Allied repeatedly identified the tracks it acquired from LTV as "private tracks." However, in some instances, the legal distinction the Board articulated in *Pinelawn* between "private" and "excepted" tracks was admittedly blurred by various assertions that the Board lacked "authority" over the tracks Allied acquired from LTV that are at issue herein. Such assertions must be corrected to reflect the fact that the Board has never had any jurisdiction over these tracks,¹ which is entirely consistent with Allied's repeated position that the

¹ See, Joint Supplemental Comments at pp. 2, 3, 4, and 5. In particular, the heading at page 4 should be corrected to state that "The Board lacks

network of tracks assembled by Republic Steel and now owned by Allied was “never intended to be part of the national rail system.”²

In order to clarify its position, Allied, consistent with the Board’s explanations in *Pinelawn*, specifically contends that the Board has **no jurisdiction** whatsoever over the private tracks that Allied acquired from LTV in 1992 and, therefore, Allied’s state law remedies to enforce the terms of the easement granted to LTV Steel are not preempted. The same argument applies in the pending proceeding in F.D. No. 35477, *Allied Industrial Development Corporation-Petition for Declaratory Order*.

Respectfully submitted,

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jurisdiction over the tracks involved in this proceeding, as well as private contracts pertaining thereto”.

² Id. at 2.

Certificate of Service

I hereby certify that on April 23, 2015, a copy of the foregoing Joint Motion was served upon the following persons by Email:

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