

BEFORE THE SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423

Docket No. FD 35316

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

235685
ENTERED
Office of Proceedings
March 25, 2014
Part of
Public Record

MOTION TO WAIVE PROVISIONS OF 49 CFR 1101.13
TO PERMIT FILING OF REPLY TO RESPONDENTS' REPLY TO
PETITION TO REOPEN AND SUPPLEMENT THE RECORD

Allied Erecting and Dismantling Co., Inc. and Allied Industrial Development Corporation (collectively "Allied"), by and through counsel, respectfully request the Board to waive the provisions of 49 CFR 1104.13 and permit the filing of a Reply to Respondents' Reply. Given the fact that the underlying litigation involving the tract of land immediately to the east of the Center Street Bridge has extended nearly eight (8) full years at a substantial cost to all parties, it is in everyone's best interest to ensure that the Board is fully informed in reaching its decision in the instant case.¹

¹ The same is true with respect to the companion case, FD 35477, *Allied Industrial Development Corporation-Petition for Declaratory Order*. That proceeding, which involves the issue of the ownership of a single parcel of real estate located to the west of the Center Street Bridge on the south side of the Mahoning River, has been pending before the Board for three full years. Because that issue is not within the Board's statutory jurisdiction and must be resolved by the state court, Allied, on March 24, 2011, requested the Board to issue a declaratory finding that the state court action was improvidently referred to the Board.

Introduction

In order to preserve its right to seek judicial review of the Board's decision served December 20, 2013 in this proceeding (hereinafter the "*December Decision*"), Allied, on February 4, 2014, filed a petition for review with the United States Court of Appeals, Case No. 14-3094, *Allied Erecting, et al v. STB, et al.* Thereafter, in order to provide the Board with an opportunity to modify its conclusion based on Allied's further review of the materials upon which the Board had relied, Allied filed a Petition with the Board to Reopen and Supplement the Record on February 20, 2014. On that same date, Allied filed a Motion to Hold Briefing Schedule in Abeyance with the Court of Appeals. That motion has been granted and Allied has been directed to file a status report with the Court every 60 days with the first status report being due May 19, 2014.

Because Respondents Have Intentionally Mischaracterized Allied's Evidence In Their Reply, Allied Should Be Given The Opportunity To Respond So That It Will Not Be Prejudiced.

In its Petition to Reopen, Allied focused on certain documents *already of record*, including MVRV's Articles of Incorporation, MVRV's Return to Questionnaire and the Federal Register Notice announcing MVRV's 1981 application for operating authority. As is evident from its *December Decision*, the Board unquestionably relied upon those documents.

After a careful review of those documents, accompanied by an inspection of the actual site in Youngstown, Ohio, the conclusion was reached that

reopening should be sought on the grounds that the Board had committed material error in drawing certain key assumptions from those documents. Therefore, consistent with the Board's regulations at 49 CFR 1115.4, Allied filed a Petition to Reopen and set forth in detail the facts contained in those documents that, in Allied's reasoned opinion, disclose the material error in the Board's key findings in its *December Decision*. In order to corroborate its interpretation of those documents, Allied also introduced the Verified Statement of William C. Spiker that, based on his contemporaneous knowledge of MVRV's original operations as a common carrier that replaced Jones & Laughlin's in-plant railroad operations, confirmed that MVRV, in 1981, did *not* seek authority to provide common carrier service within the facilities of Republic Steel. Mr. Spiker's testimony unquestionably confirms Allied's position that the Board erred in its *December Decision* when it found that tracks located in Republic Steel's facility "are encompassed within the ICC's grant of operating authority that MVRV received in 1982".² In addition, Allied provided the Board with detailed evidence reflecting the location of the MVRV tracks, many of which have been removed, that were the actual subject of MVRV's 1981 application.

In their Reply, Respondents have made no attempt to address the merits of Allied's evidence. Instead, they admit that they have deliberately avoided "addressing the accuracy of the information or the implications Allied has

² December Decision at 13.

asserted based on that information.” Response at 8, n. 4. Nevertheless, Respondents say that they “reserve the right to investigate and challenge any or all of the information if the Board were to decide to reopen the proceeding.” *Id.* Allied, having expended millions of dollars in assembling and remediating the real property that is being adversely impacted, is poised to develop a foreign trade zone on its property. Because time is of the essence, it strenuously objects to any further tactics that would extend this proceeding any further.

Allied respectfully submits that Respondents’ contentions regarding the alleged “new evidence” are patently frivolous. The conclusions that Allied has drawn from the literal wording of the Questionnaire are straight forward and unquestionably reveal the material error in the Board’s conclusion that the LTV Tracks, which are located in Youngstown on the south side of the Mahoning River and are not physically connected with MVRV’s tracks, which are located in Struthers, are encompassed within the ICC’s grant of operating authority that MVRV received in 1982.

As Allied has conclusively demonstrated, MVRV’s 1981 application under 49 U.S.C. § 10901 for a certificate of public convenience and necessity did *not* include a request to provide common carrier service within Republic Steel’s facility on the south side of the Mahoning River. Furthermore, there is nothing to indicate that any effort thereafter was made to acquire an additional license from the ICC or the Board that would have covered MVRV’s operations over any of the in-plant tracks located within Republic Steel’s facility.

It is respectfully submitted that there is no evidence whatsoever that could be introduced to contradict Allied's interpretation of the Questionnaire and the related materials. If Respondents have any probative evidence that could rebut Allied's interpretation, they should have produced it along with their reply rather than looking for a means to extend the controversy.

Furthermore, if Respondents were to contest Allied's contention that MVRVY *never* obtained common carrier authority pursuant to Section 10901 to provide service over the "LTV tracks" located wholly within the confines of Republic Steel's former facilities, it should have presented evidence of that authority as part of its reply. The lack of certificated authority in this case is highly significant. As Allied previously noted, if MVRVY "never obtained the regulatory authority to operate over the tracks, then none of Allied's state law claims against [MVRVY] could be federally preempted."³ Furthermore, there would be no need to seek the Board's authorization to abandon any of the in-plant "industrial" and "spur" tracks that were constructed and formerly used to provide switching service within those facilities.

Even if MVRVY operated over the LTV tracks, pursuant to the provisions of former Section 10907 (now Section 10906), it did not require ICC or Board authority as all of those tracks were ancillary in-plant, industrial and spur tracks that did not involve Section 10901 authority. Respondents' reliance on the Board's reasoning in *Grafton & Upton Railroad Company – Petition for*

³ December Decision at 10.

Declaratory Order, STB Docket No. FD 35776 (served January 27, 2014), is misplaced.⁴ Respondents correctly recite the Board’s statement that “G&U’s construction and use of the Parcel for rail carrier operations does not require our licensing authority because the construction of ancillary tracks and facilities is excepted from licensing by 49 U.S.C. § 10906.” However, Respondents then distort the Board’s reasoning by failing to include the entirety of following sentence. That sentence reads as follows: “Nonetheless, the express statutory preemption of § 10501(b) applies here *to prevent Grafton from imposing environmental and land use regulations and permitting requirements that could be used to deny or unreasonably delay the rail carrier’s ability to use its property for railroad operations.*”⁵

Allied is not seeking to use the state courts to impose any governmental regulations on MVRVY or to interfere with any legitimate use of Allied’s tracks. The primary dispute in the state court is whether Allied owns Lot No. 62188 as a result of its purchase of that lot in 2009 from Gearmar Properties Inc. (“Gearmar”). Gearmar, in turn, had previously acquired that lot in 2007 from Ohio & Pennsylvania Railroad Company (“OHPA”), which is one of the Respondents. In the ongoing state court litigation, OHPA is taking the position that it did not sell Lot No. 62188 to Gearmar. That position is being contested by Gearmar, which is taking the position that it lawfully acquired Lot 62188 from MVRVY in 2007 and two years later sold it to Allied. Unfortunately,

⁴ Response at 9.

⁵ Id. at 9 (the italicized portion reflects the omitted language).

resolution of the ownership issue has been delayed for at least three years because the Board has not yet ruled on Allied's request that the Board ask the state court to decide the ownership issue in the first instance. Therefore, Allied renews its request that the Board decline the state court's invitation to resolve issues that it improvidently and prematurely referred to the Board.

As the Board has previously emphasized, "[i]t is well settled that the interpretation of deeds and the determination of who owns good title are issues of State law that are outside the expertise of this Board." *Central Kansas Railway LLC—Abandonment Exemption, Marion & McPherson Counties, KS*, 2001 WL 489991 at 2, 4-6. Consistent with its precedent, the Board should summarily reject Respondents' baseless suggestion that Allied is somehow making "use of the state courts ... [to] interfere with MVRV's use of the LTV easement tracks for railroad purposes regardless of whether the tracks are considered a line of railroad or Section 10906 tracks."⁶

The Board's reasoning in *Central Kansas* is consistent with judicial precedents that draw a distinction between a state's or local government's attempt to regulate rail transportation and an attempt by a private party to enforce the terms of a voluntary private contract that a railroad has entered into with that other party. As multiple courts have recognized in rejecting claims that the ICCTA would preempt voluntary agreements between private parties, such agreements do not constitute the sort of regulation expressly

⁶ Response at 9. That OHPA is actively engaged in the state court litigation is yet another reason to disregard Respondents' baseless suggestion.

preempted by ICCTA. *See PCS Phosphate Company, Inc. v. Norfolk Southern Corp.*, 559 F.3d 212 (4th Cir. 2009) and cases cited therein. Furthermore, as United States District Judge Gwin explicitly reasoned in finding that Respondents had improperly removed Allied’s state court action to Federal Court:

Allied Industrial’s Ohio law claims cannot be said to “regulate” the abandonment of rail lines. It is true that the upshot of Allied Industrial’ claims (if successful) might affect certain of the defendants’ rail lines. But the cause of that outcome is not Ohio’s direct regulation of the defendants’ rail lines; rather, the cause is the defendants’ sale of the two parcels at issue to Gearmar.

In any event, even though the Board (and not the State of Ohio or the City of Youngstown) may have exclusive jurisdiction over the “industrial” and “spur” tracks that are involved in this proceeding, the Board has no authority over their operation. As was carefully explained in *Port City Props. v. Union Pac. R.R.*, 518 F.3d 1186, 1188 (10th Cir. 2008), “[w]hen sections 10906 and 10501(b)(2) are read together, it is clear that Congress intended to remove {STB} authority over the entry and exit of these auxiliary tracks while still preempting state jurisdiction over them, leaving the construction and disposition of {them} entirely to railroad management.” Plainly, given the absence of any Section 10901 operating authority to MVRV to conduct operations over the LTV tracks, the Board would have no authority to adjudicate the abandonment of the LTV tracks if and when a decision were to be made to remove them if necessary to reclamate and develop the property.

Respondents' Assertions Regarding The Necessary Removal Of Track In Order To Make Essential Sewer Line Repairs Must Be Viewed In Connection With MVRV's Ongoing Failure To Maintain Main Track #3 As Required By The LTV Easement And The Provisions Of Its 2001 Transportation Services Agreement With LTV.

At page 4 of their Reply, Respondents repeat the complaint, previously voiced in a letter to Cynthia T. Brown from Respondents' counsel, dated October 30, 2013, that Allied's temporary removal of 75 feet of track 239, which is located on lot 62188 west of the Center Street Bridge, in order to perform storm sewer repairs has interfered with its operations over the LTV easement tracks. That contention is a further red herring.

In the first place, the 1992 LTV Easement applies only to tracks that are located on Allied's property that is located on the east side of the Center Street Bridge. As explicitly stated therein, the LTV Easement extends in an easterly direction from the *west* property line of the parcel of land that Allied acquired from LTV in 1992. Therefore, any tracks to the west of that property line would not be encompassed within the 1992 LTV Easement Agreement with Allied.

In particular, it does not apply to any of the tracks that are physically located on Lots 62188 and 62320, which are located to the west of the Center Street Bridge. Because MVRV, which formerly owned lot 62188, failed to require any easements when it sold that lot to Gearmar in 2007, that lot was free and clear of any easements related to tracks when Gearmar sold it to Allied in 2009. As noted previously, the contested issue of ownership of lot 62188 is an issue that is beyond the expertise of the Board to resolve, which is why

Allied exactly three (3) years and one day ago requested the Board to reject the state court's referral of the issues involved in FD 35477.

Second, MVRV has only itself to blame for any inconvenience caused by the sewer repairs. What MVRV fails to mention is that it could have used the No. 2 and 3 Main tracks to reach its locomotive repair shop, which is located on lot 62189, just to the west of the Center Street Bridge. That lot is owned by MVRV. As the detailed map submitted by Allied reflects, the No. 2 and 3 Main tracks extend along the south shore of the Mahoning River in more or less of a straight line from lot 62189 to NSR's Haselton Yard.

The Board is also asked to note that the plain wording of the 1992 LTV Easement Agreement required LTV at its "sole cost and expense" to maintain and repair the railroad tracks "located on the property that the Mahoning Valley Railway Company leases from LTV". Those tracks specifically included the No. 2 and No. 3 Mains. Between 1992 and 2001, LTV maintained the tracks.

However, in 2001, MVRV agreed to assume responsibility for the maintenance of those tracks. As part of the sale of the MVRV to Summit View, Inc., MVRV entered into the 2001 Transportation Services Agreement with LTV to ensure service to LTV's facility located to the west of the Center Street Bridge. That Agreement specifically terminated "[a]ll oral and written agreements between LTV and [MVRV] for transportation services that also are the subject of this Agreement ...".

In addition, Section 4.02 and Schedule 4.02 of the Transportation Services Agreement imposed the specific requirement that MVRV maintain Main Tracks 2 and 3 to “Strict class 1 FRA Track Standards or better.” In breach of that requirement, MVRV wholly failed to do so. Plainly, if MVRV had properly maintained the Main Tracks identified in Schedule 4.02 of the Transportation Services Agreement, which included both the # 2 and 3 Main tracks to strict class 1 FRA standards or better as required by Section 4.02, MVRV could easily access its locomotive shop. Had it done so, there would be no right or reason to use the track that Allied removed to repair the storm sewer that is located under the track. Allied confirms that it has never contested MVRV’s right to reach its locomotive shop in lot 62189 in order to repair or store its locomotives.

Allied also notes that following cessation of LTV’s operations and the dismantling of portions of the structures that were once located to the west of the Center Street Bridge, there are no remaining shippers to be served by MVRV, which MVRV has conceded. Furthermore, because MVRV and OHPA have sold both of the lots that they owned without reserving any easements for future rail service, and because they never acquired any authority pursuant to 49 U.S.C. § 10901, they have no continuing rights to operate over any of the in-plant tracks owned by Allied that are located on lots 62320 or 62188.

Because Allied owns two locomotives and two rail car movers that it intends to use in its in-plant operations as it develops its properties, it intends to leave some of the tracks in place and to utilize, repair and maintain others

for its operations. However, until such time as its ownership is overruled by a court with competent jurisdiction, it will continue to contest MVRV's ability to utilize any of Allied's tracks with the exception of the 2 and 3 Main tracks.

MVRV's Assertion That It May Want To Stop, Store and Stage Cars On Allied's Tracks In The Future Must Be Rejected As An Unwarranted Intrusion On Allied's Private Property.

Although Respondents insist that the MVRV may have a future need to store cars on Allied's tracks,⁷ it has offered no explanation regarding the segments of track that it removed from its certificated route on the north side of the Mahoning River. As a matter of both law and equity, there is absolutely no reason to allow MVRV to store cars on Allied's tracks and disrupt Allied's ongoing efforts to develop its property when MVRV, by scrapping its own tracks, has disabled its ability to store cars on its own land that is perhaps a quarter of a mile to the north of Allied's property.

In order to fully utilize its private property, Allied, which has absolutely no need for MVRV's switching services, must be able to move its own locomotives over the in-plant tracks located on its private property. Furthermore, it should be able to do so without being hassled and blocked by MVRV and railcars that are randomly placed, as was previously the case, on tracks in such a fashion that Allied's use of its own tracks was intentionally interfered with and impeded by Ohio Central. This is of particular importance

⁷ Reply at 5.

when MVRV has no authority issued by either the ICC or the Board to operate on Allied's private tracks.

Conclusion

For all the above-stated reasons, the Board should waive the prohibition against a reply to a reply and take into consideration the matters discussed herein. It is respectfully submitted that such action will foster the full development of the record. Given the harmful effects of any further delay, expedited consideration is requested.

Respectfully submitted,

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Certificate of Service

I hereby certify that on March 25, 2014, a copy of the foregoing Motion was served upon the following persons by Email:

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