

Before the
SURFACE TRANSPORTATION BOARD

235908

STB Docket No. FD 35477

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April 17, 2014
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ALLIED INDUSTRIAL DEVELOPMENT CORPORATION
- PETITION FOR DECLARATORY ORDER -

REPLY OF RESPONDENTS TO
MOTION SEEKING EXPEDITED RESOLUTION OF PROCEEDING

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Dated: April 17, 2014

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SURFACE TRANSPORTATION BOARD

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**ALLIED INDUSTRIAL DEVELOPMENT CORPORATION
- PETITION FOR DECLARATORY ORDER -**

**REPLY OF RESPONDENTS TO
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On March 28, 2014, Allied Industrial Development Corporation (“Allied”) filed a motion (the “Motion”) seeking expedited resolution of the instant proceeding. Disregarding the initial referral of this matter to the Board by the Court of Common Pleas of Mahoning County, Ohio (the “State Court”), Allied in its Motion, as it did in its original Petition for Declaratory Order does not seek to have the matter heard by the Board, but rather seeks to have the Board send the matter back to the State Court. While Respondents¹ do not oppose the Board establishing a reasonable procedural schedule and moving the proceeding forward (in fact, the Respondents asked the Board to do so in a letter filed October 30, 2013), Respondents do oppose sending the matter back to the State Court before the referred issues have been addressed by the parties and determined by the Board.

¹ “Respondents” include all of the parties named in Allied’s Petition for Declaratory Order, those being: Ohio & Pennsylvania Railroad Company (“OHPA”), Mahoning Valley Railway Company (“MVRV”), Ohio Central Railroad, Inc., Warren & Trumbull Railroad Company, Youngstown & Austintown Railroad, Inc. and Youngstown Belt Railroad Company (the “Railroad Respondents”), and their direct and indirect corporate parents, Summit View, Inc. (“Summit View”) and Genesee & Wyoming Inc. (“GWI”). By responding herein, Respondents do not acknowledge that they are all properly named as respondents.

Procedural Background

This matter commenced on March 24, 2011, with the filing by Allied of a Petition for Declaratory Order based on a referral by the State Court. The Respondents filed their Reply (“Reply to Petition”) on April 13, 2011. The State Court action involved among other questions, whether one of the Respondents (Mahoning Valley Railway Company (“MVRVY”)) had abandoned its rail lines or other railroad facilities located on a property with disputed ownership, and whether Allied’s state law eviction and damage claims which would prevent MVRVY from using the tracks and other railroad facilities are preempted by federal law.

Although ostensibly a petition that should have asked the Board to decide the issues within its jurisdiction as directed by the State Court, Allied’s Petition for Declaratory Order instead sought to have the matter sent back to State Court contending that there were no issues within the jurisdiction or expertise of the Board. Respondents disagreed and asked the Board to institute the declaratory order proceeding. The Board has not yet established a procedural schedule.

Although no factual record has yet been established, Allied now seeks again to have the matter sent back to the State Court, relying on “evidence” that it has sought to introduce on reopening in a separate Board proceeding (STB Docket No. FD 35316). Respondents have opposed the reopening in STB Docket No. FD 35316, and the introduction of the additional evidence.

Discussion

As noted, Respondents do not oppose the establishment of a procedural schedule. Respondents in their Reply to Petition proposed that the proceeding be handled under the Board’s modified procedures, and they continue to believe that is how the matter should be

handled. Attached as Exhibit A is the procedural schedule that Respondents proposed in their Reply to Petition.

No evidence has yet been presented in this proceeding. In particular, the “evidence” Allied references, has not been admitted in this or in any other proceeding before the Board. Allied could certainly seek to introduce the additional documents and statements as part of its opening statement in this proceeding. Such evidence would be subject to examination and discovery (49 CFR Part 1114), and to any contrary evidence presented by Respondents in its reply. The effect of the evidence presented by the parties would also be subject to legal argument. However, it is not be appropriate for the Board to make any decisions in this proceeding until the parties have had the opportunity to establish a full and complete record, and make their arguments to the Board.

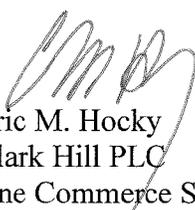
Moreover, the Motion (as well as the original Petition for Declaratory Order) ignores that there are issues of preemption that go beyond whether the track that Allied unilaterally removed is part of a line of railroad. The continued use of the tracks on the property (whether line of railroad, or yard or other Section 10906 tracks) has always been at issue in this proceeding. *See* Respondents’ Reply to Petition, at 6-8. The language of 49 USC 10501(b)(2) explicitly preempts local and state regulation (including state court actions) involving spur and other Section 10906 tracks, even if they are located in one state, and such tracks are still clearly subject to the Board’s jurisdiction. *Allied Erecting and Dismantling, Inc. – Petition for Declaratory Order – Rail Easement in Mahoning County, Ohio*, STB Docket No. FD 35316 (served December 20, 2013), slip op. at 14, fn.74 (*citing 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)). Even assuming *arguendo* that Allied is correct that the track that it removed is not part

of a line of railroad, there are a number of other issues related to preemption for the Board to decide. Attached as Exhibit B is a list of the issues that Respondents suggested in their Reply to Petition should be considered by the Board.

Conclusion

For the reasons set forth above, and in Respondents' Reply to Petition fr, the Board should establish a procedural schedule, but should not send this matter back to the State Court without having addressed the issues raised in the referral order.

Respectfully submitted,



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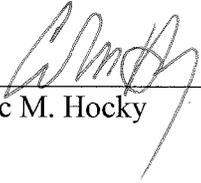
Dated: April 17, 2014

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2014, a copy of the foregoing Reply of Respondents to Motion Seeking Expedited Resolution of Proceeding was served upon the following persons by email:

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Eric M. Hocky

EXHIBIT A

RESPONDENTS' PROPOSED PROCEDURAL ORDER²

- Day 0 - Board institution of proceeding
- Day 90 - Petitioner's Opening Statement
- Day 150 - Respondents' Reply
- Day 180 - Petitioner's Rebuttal

² Respondents' Reply to Petition for Declaratory Order, at 9.

EXHIBIT B

RESPONDENTS' SUGGESTED ISSUES FOR CONSIDERATION BY THE BOARD³

- (1) Does the ICC Termination Act, 49 USC §10101 *et seq.* ("ICCTA") preempt Allied's state law claims seeking immediate eviction from Lot 62188 and damages? [Motion to Dismiss or Refer at 6-9]
- (2) Has MVRVY abandoned its rail lines, yard tracks, access tracks or other railroad facilities on Lot 62188? If not, can Allied force abandonment through a state law eviction proceeding? [Motion to Dismiss or Refer at 9-14, 17; Amended Counterclaim and Third Party Complaint, ¶¶37, 41]
- (3) Are Allied's state law claims for damages preempted by ICCTA? [Motion to Dismiss or Refer at 14]
- (4) Is the purported sale of Lot 62188 void since the purchaser did not obtain Board authority to acquire the lines of railroad, tracks or other railroad facilities and/or common carrier obligations related thereto? [Motion to Dismiss or Refer at 17, n.9; Amended Counterclaim and Third Party Complaint, Count II, ¶¶ 35-36]
- (5) Would Allied's state court claims, if granted, unreasonably interfere with MVRVY's operations in interstate commerce in violation of the Commerce Clause? [Motion to Dismiss or Refer at 17, n.9; Amended Counterclaim and Third Party Complaint, Count II, ¶¶ 40, 42]

³ Respondents' Reply to Petition for Declaratory Order, at 6-7.