

Eric M. Hocky  
Direct Dial 215 640 8523  
Email: ehocky@thorpreed.com

ATTORNEYS AT LAW SINCE 1895

**VIA ELECTRONIC FILING**

Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street SW  
Washington, DC 20024

November 23, 2009

Re: STB Finance Docket No. 35316  
Allied Erecting and Dismantling, Inc. and  
Allied Industrial Development Corporation –  
Petition for Declaratory Order  
**Reply of Respondents**

Dear Ms. Brown:

Enclosed for filing is a Reply of Respondents to the Petition for Declaratory Order filed in this proceeding. Copies have been served on all parties shown in the Certificate of Service attached to the Reply.

Respectfully,

Eric M. Hocky

EMH/e

Enclosure

cc: All parties on service list

*Pittsburgh*

*Philadelphia*

*Princeton*

*Wheeling*

Thorp Reed & Armstrong, LLP  
One Commerce Square  
2005 Market Street  
Suite 1910  
Philadelphia, PA 19103  
215 640 8500  
215 640 8501 Fax

{P0086017}

Before the  
**SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35316

**ALLIED ERECTING AND DISMANTLING, INC. AND  
ALLIED INDUSTRIAL DEVELOPMENT CORPORATION -  
PETITION FOR DECLARATORY ORDER**

---

**REPLY OF RESPONDENTS**

Eric M. Hocky, Esq.  
Thorp Reed & Armstrong, LLP  
One Commerce Square  
2005 Market Street, Suite 1000  
Philadelphia, PA 19103  
215-640-8500

C. Scott Lanz, Esq.  
Thomas J. Lipka, Esq.  
Manchester, Bennett, Powers & Ullman, L.P.A  
The Commerce Building  
Atrium Level 2  
201 E. Commerce Street  
Youngstown, Ohio 44503  
330-743-1171

Attorneys for Respondents Ohio Central  
Railroad, Inc., et al.

Dated: November 23, 2009

Before the  
**SURFACE TRANSPORTATION BOARD**  
STB Finance Docket No. 35316

**ALLIED ERECTING AND DISMANTLING, INC. AND  
ALLIED INDUSTRIAL DEVELOPMENT CORPORATION -  
PETITION FOR DECLARATORY ORDER**

---

**REPLY OF RESPONDENTS**

**A. Preliminary Statement**

On November 2, 2009, Petitioners Allied Erecting and Dismantling, Inc. and Allied Industrial Development Corporation (collectively, “Allied”) filed a Petition for Declaratory Order (the “Petition”), based on the order (the “State Court Order”) of Magistrate Dennis Sarisky of the Court of Common Pleas of Mahoning County, Ohio in Civil Action No. 2006-cv-00181 (the “State Court Action”) referring certain questions to the Board for resolution. Allied has named as “Respondents” to the Petition the various railroads that were named as defendants in the State Court Action.<sup>1</sup> The questions relate to the scope of the rights of certain of the railroad Respondents to use easements across property of Allied.

Respondent railroads, as parties to the State Court Action, are properly parties to participate in this proceeding. (Summit View and GWI, which are not parties to the State Court Action, should not be named as parties in this proceeding.) Respondents do not oppose the initiation of a declaratory order proceeding by the Board. (Respondents were the moving party

---

<sup>1</sup> Allied has also named Summit View, Inc. (“Summit View”) and Genesee & Wyoming, Inc. (“GWI”) as Respondents although they are not parties to the State Court Action. Summit View and GWI are the owner and indirect owner, respectively, of the Respondent railroads, and have Board authority to control the railroads together with other railroads under their control. However, they do not operate the tracks in question, and would not be proper parties to this declaratory order proceeding if instituted by the Board.

for referral in the State Court.<sup>2</sup>) The questions have been referred by a court of competent jurisdiction, and the controversies at issue (relating to the scope of common carrier obligations and rights to operate of carriers subject to the jurisdiction of the Board, and the scope of preemption of state laws claims with respect thereto) are within the Board's primary jurisdiction. Accordingly, it is appropriate for the Board to initiate a proceeding pursuant to the Board's authority under 5 USC §554(e) and 49 USC §721.

Respondents do not believe that the Board's proceeding should look at the questions raised by Allied which are beyond the scope of the questions referred by the State Court. These additional questions relating to possible rights of Respondent on property other than that covered by the LTV Easement Agreement or the P&LE Easement Agreement, are the subject of separate federal court litigation, are beyond the scope of the referral order, and not relevant to the determination of the questions referred. *See* Petition, ¶¶ 34-35, and the responses thereto set forth below.

In addition to the inclusion of the State Court referral order, and a request that the Board issue a declaratory order, the Petition includes numerous unsupported and unverified allegations (it reads like a complaint), and no legal argument. Thus, it cannot stand as Allied's case in chief. Although not specifically requested in the Petition, Respondents request that the Board consider this matter under the modified procedure rules at 49 CFR part 1112 as is common in other proceedings under referrals from the courts. *See, for example, West Point Relocation, Inc. and Eli Cohen – Petition for Declaratory Order*, STB Finance Docket No. 35290 (served October 23, 2009). Discovery has been available in the State Court proceeding, and

---

<sup>2</sup> Attached for the Board's reference is a copy of Defendants' Motion to Dismiss or in the Alternative Refer to the Surface Transportation Board, and Memorandum in Support (without the appendix of unreported cases), filed with the State Court on May 1, 2009.

Respondents do not believe that additional discovery is necessary to resolve the questions that have been referred to the Board. Respondents propose the following procedural schedule for consideration of the Board<sup>3</sup>:

- Day 0 - Board institution of proceeding
- Day 60 - Petitioners' opening statement and argument due
- Day 90 - Respondents' reply statement and argument due
- Day 105 - Petitioner's rebuttal due

**B. Answers to Allegations of Petition**

Although under the proposed schedule, the reply statement of Respondents would not be due until after the Petitioners' opening statement, Respondents are including the following answers to the allegations in the Petition in order that certain disputed allegations not be deemed admitted by the failure of Respondents to respond. Respondent reserves the right to supplement its answers in Respondents' reply statement and argument. Subject to the foregoing, Respondent states as follows:

1. Admitted.
2. Respondents are without knowledge or information sufficient to form a belief regarding the statement, and therefore, Respondents deny the same.
3. Respondents are without knowledge or information sufficient to form a belief regarding the statement, and therefore, Respondents deny the same.
4. Denied. The "Ohio Central Railroad System" is merely a trade name that is used for limited business purposes by certain railroads including Respondent railroads.

---

<sup>3</sup> Respondents have suggested a longer time period for the filing of the opening statement because of the intervening holidays.

5. Admitted only that Respondent railroads are commonly controlled, and that “Ohio Central Railroad System” is a trade name that is used for limited business purposes by certain railroads including Respondent railroads.

6. Denied as stated. Summit View is the corporate parent of the Respondent railroads, and GWI is the indirect parent of the Respondent railroads. Neither Summit View nor GWI is an “operator” of the railroads or their properties.

7. Respondents are without knowledge or information sufficient to form a belief regarding the statement, and therefore, Respondents deny the same. Further, Respondents believe that the property described as the “Allied Property” included various facilities, and not just the “LTV Steel Company, Inc. plant.”

8. Admitted.

9. Admitted. By way of further answer, the LTV Easement Agreement was entered into at the time, and as part of, a transaction in which LTV sold the underlying property to Allied Industrial.

10. Denied. On the contrary, the tracks include “lines of railroad” that are part of the interstate rail network, and which have been, and continue to be, used by The Mahoning Valley Railway Company (“MVRV”) to perform its common carrier obligations.

11. Admitted that LTV owned other real property in the area of the property conveyed to Allied Industrial. Denied that the LTV easement was retained for that reason. The LTV easement was retained so that LTV’s subsidiary railroad, MVRV, could continue to use the tracks and to perform its common carrier obligations, and not merely to serve the LTV Electric Welded Tube facility.

12. Denied as stated. The LTV Easement Agreement is a document that speaks for itself.

13. Denied as stated. It is denied that MVRVY's rights are limited. By way of further answer, in 2001, LTV transferred its right, title and interest in and to the LTV Easement and the LTV Easement Agreement to its subsidiary MVRVY. Immediately thereafter, LTV sold the stock of MVRVY to Summit View, Inc. ("Summit View") which had obtained authority to control MVRVY together with the other railroads in Summit View's corporate family. MVRVY is the holder of all of the common carrier obligations with respect to the tracks covered by the LTV Easement Agreement, as well as the holder of all of the rights of LTV's rights as the easement holder under the LTV Easement Agreement.

14. The P&LE Easement Agreement is a document that speaks for itself. By way of further answer, the P&LE Easement Agreement was entered into at the time, and as part of, a transaction in which P&LE sold the underlying property to Allied Erecting.

15. Admitted.

16. Admitted. By way of further answer, OHPA had authority to operate over the P&LE line prior to CQPA's operation of the line..

17. Admitted that OHPA's operating rights terminated when Youngstown and South Eastern began to operate over the property as of December 1, 2006. OHPA has not operated the P&LE Easement since that time.

18. Denied. MVRVY continues to have rights to operate the tracks under the LTV Easement Agreement.

19. Denied. These allegations as set forth in the State Court Complaint have not yet been adjudicated. By way of further response, Respondents deny that they have acted beyond

the scope of their common carrier obligations, or have violated the LTV or P&LE Easement Agreements.

20. Denied. By way of further response, Respondents deny that they have acted beyond the scope of their common carrier obligations, that they have violated the LTV or P&LE Easement Agreements, or that they have caused any of the alleged damages to the Allied Property.

21. Admitted only that Allied filed a complaint against the Respondents, and otherwise, denied.

22. Admitted.

23. Admitted only that the Amended Complaint as a document speaks for itself, and otherwise denied.

24. Admitted.

25. Admitted.

26. Admitted that discovery in the State Court Action is not complete. By way of further answer, no additional discovery is required to resolve the issues referred to the Board by the State Court Order.

27. Admitted. Attached hereto is a copy of Defendants' Motion to Dismiss or in the Alternative Refer to the Surface Transportation Board, and Memorandum in Support, filed with the State Court on May 1, 2009.

28. Admitted.

29. Respondents are without knowledge or information sufficient to form a belief regarding the statement, and therefore, Respondents deny the same. Further, the purchase is the

subject of separate litigation in federal court, and is beyond the scope of the State Court Action and not properly before the Board at this time.

30. Denied. Further, the rights of Respondents with respect to the properties are the subject of separate litigation in federal court, and are beyond the scope of the State Court Action and not properly before the Board at this time.

31. Admitted only that Allied filed an eviction proceeding in state court in Ohio. By way of further answer, the matter has been removed to federal court where Respondents are defending the action, and have filed counterclaims to quiet title and for a declaratory judgment. The matters at issue are beyond the scope of the State Court Action, and are not properly before the Board at this time.

32. Admitted. *See also*, the response to paragraph 31.

33. Admitted only that the Referral Order speaks for itself, and otherwise denied. The Referral Order is attached to the Petition as Exhibit C.

34. Paragraph 34 is a request for relief that does not require a response. Respondents believe that the requested declaration is beyond the scope of the referral order, and not relevant to the determination of the questions referred, and therefore should not be considered by the Board in this proceeding.

35. Denied. The acquisition referenced by Allied is the subject of separate litigation (see paragraphs 29-32 of the Petition and the answers thereto), and is beyond the scope of the State Court Litigation, and irrelevant to questions referred by State Court.

36. Admitted that the rights of OHPA terminated as of December 1, 2006. By way of further answer, OHPA has not operated the P&LE easement since that time.

**C. Conclusion.**

For the foregoing reasons, Respondents request that the Board (1) institute a declaratory order proceeding to respond to the questions referred by the State Court, (2) reject the additional questions raised by Allied that are beyond the scope of the referral, (3) dismiss Summit View and GWI as parties to this proceeding, and (4) adopt the procedural schedule provided for herein.

Respectfully submitted,



Eric M. Hocky, Esq.  
Thorp Reed & Armstrong, LLP  
One Commerce Square  
2005 Market Street, Suite 1000  
Philadelphia, PA 19103  
215-640-8500

C. Scott Lanz, Esq.  
Thomas J. Lipka, Esq.  
Manchester, Bennett, Powers & Ullman, L.P.A  
The Commerce Building  
Atrium Level 2  
201 E. Commerce Street  
Youngstown, Ohio 44503  
330-743-1171

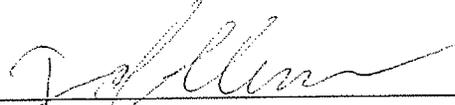
Attorneys for Respondents Ohio Central  
Railroad, Inc., et al.

Dated: November 23, 2009

VERIFICATION

I hereby verify on behalf of Respondents, under penalty of perjury, that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verification.

Executed on November 23, 2009.

  
\_\_\_\_\_  
David J. Collins

IN THE COURT OF COMMON PLEAS  
MAHONING COUNTY, OHIO



ALLIED ERECTING AND  
DISMANTLING CO., INC.,

Plaintiffs,

v.

THE OHIO CENTRAL RAILROAD,  
INC., et al.,

Defendants.

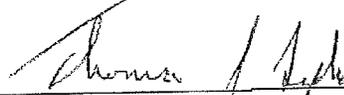
) CASE NO. 2006 CV 00181

) JUDGE MAUREEN A. SWEENEY

) **DEFENDANTS' MOTION TO**  
) **DISMISS OR IN THE**  
) **ALTERNATIVE REFER TO THE**  
) **SURFACE TRANSPORTATION**  
) **BOARD AND MEMORANDUM IN**  
) **SUPPORT**

NOW COME Defendants, 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 ("Defendants"), by and through their counsel, and pursuant to Rule 12 (B)(1) of the Ohio Rules of Civil Procedure, move the court to dismiss this action for lack of subject matter jurisdiction as Plaintiffs' state law claims are preempted by the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. §§ 10101, et. seq or in the alternative Defendants ask the Court to stay all proceedings and refer this case to the Surface Transportation Board for resolution. The grounds supporting this Motion are more fully set forth in the Memorandum attached hereto and hereby incorporated by reference.

Respectfully Submitted,



---

C. SCOTT LANZ (#0011013)

THOMAS J. LIPKA (#0067310)

Attorneys for Defendants

MANCHESTER, BENNETT, POWERS

& ULLMAN

201 E. Commerce Street, Atrium Level Two

Youngstown, Ohio 44503

Telephone (330) 743-1171

Facsimile (330) 743-1190

Email: [slanz@mbpu.com](mailto:slanz@mbpu.com)

[tlipka@mbpu.com](mailto:tlipka@mbpu.com)

## MEMORANDUM IN SUPPORT

### I. STATEMENT OF FACTS

Plaintiffs, Allied Erecting and Dismantling Company, Inc., and Allied Industrial Development Corporation ("Plaintiffs") filed their Plaintiffs' First Amended Complaint ("Complaint") February 6, 2006.<sup>1</sup> The Complaint alleges that, on May 6, 1993, Plaintiffs granted a perpetual non-exclusive railroad easement ("the LTV Easement") to LTV Steel Company, Inc. ("LTV") that allowed LTV to operate, use, maintain, repair, restore, replace, and abandon the subject railroad tracks and related equipment for the purpose of running rail cars on various specifically identified tracks located on Plaintiffs' property. First Amended Complaint at ¶¶ 10-11. According to the Complaint, LTV subsequently assigned its right, title and interest in the LTV Easement to Defendants, entitling Defendants to the rights and privileges as set forth in the LTV Easement agreement. First Amended Complaint at ¶ 12.

Additionally, the Complaint alleges that, on September 17, 1993, Plaintiffs granted a perpetual non-exclusive railroad easement ("the PLE Easement") to Pittsburgh Lake Erie Properties, Inc. ("PLE") for railroad operations on Plaintiffs' property. First Amended Complaint at ¶ 13. Similarly, the Complaint states that PLE assigned the PLE easement to Defendants. First Amended Complaint at ¶ 14.

After providing the background on the ownership of the LTV Easement and the PLE Easement, Plaintiffs claim that Defendants have

continually held, stored, and/or otherwise impermissibly stopped  
rail cars on various tracks on [Plaintiffs'] Property in a manner that

---

<sup>1</sup> The Complaint makes reference to each of the Plaintiffs and Defendants separately; however, for the purposes of this Motion, individual references to specific Plaintiffs and specific Defendants in the Complaint are replaced with "Plaintiffs" and "Defendants" respectively.

(1) adversely impacts not only [Plaintiffs'] ability to utilize these tracks, but also [Plaintiffs'] current operations and [Plaintiffs'] intended development plans, (2) allows hazardous contents of rail cars containing, inter alia, oil, chemicals and/or untarped construction and demolition debris to contaminate [Plaintiffs'] Property, and (3) creates an attractive nuisance to vagrants and vandals.

First Amended Complaint at ¶ 15. Additionally, Plaintiffs allege that Defendants are holding, storing and/or otherwise impermissibly stopping its cars on Plaintiffs railroad tracks in which Defendants have no easement rights whatsoever, and that Defendants have damaged Plaintiffs' rail, bumpers and other property. First Amended Complaint at ¶ 16. Finally, the Complaint claims that Defendants have wrongfully taken dominion and control of Plaintiffs property and are using it as a transfer point or switchyard as if the property was Defendants' property. First Amended Complaint at ¶ 17.

Count I of the Complaint claims that Defendants' conduct, as set forth above, constitutes misuse, abuse and overburdening of LTV Easement and the PLE Easement for which Plaintiffs request preliminary and permanent injunctive relief requiring Defendants to cease and desist holding, storing and/or otherwise impermissibly stopping rail cars on the rail lines on Plaintiffs' property. Count II of the Complaint states that Defendants' conduct, as set forth above, unreasonably exceeds the proper and authorized scope of the easements agreements entitling Plaintiffs to monetary damages. Count III of the Complaint claims that Defendants' stopping, holding and storing railcars on Plaintiffs' property unjustly enriched Defendants entitling Plaintiff to monetary damages. Finally, Count IV of the Complaint claims that Defendants' above-described actions constitute a trespass entitling Plaintiffs' to monetary damages.

For the purposes of this Motion only, Defendants assume that the above-recited facts are true. However, in addition to the above-stated facts, it should be noted that each of the named

Defendants are Class III rail carriers registered with the Surface Transportation Board. (Terry Feichtenbinder Affidavit ¶ 5 attached hereto as Exhibit A). Further, all of the Defendants are engaged in interstate commerce. *Id.* at 6. Finally, the use of rail lines located on Plaintiffs property by Defendants was in furtherance of interstate commerce. *Id.* at 9.

## II. LAW AND ARGUMENT

Defendants, 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 (“Defendants”) respectfully request the Court to grant Defendants’ Motion to Dismiss Plaintiffs’ First Amended Complaint on the grounds that Plaintiffs’ state law claims are preempted by the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. §§ 10101, et. seq. (“ICCTA”).

### A. **THE COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFF’S COMPLAINT.**

#### 1. **Legal Standard for Rule 12(B)(1) Dismissal.**

A motion to dismiss for lack of subject matter jurisdiction under Civil Rule 12(B)(1) challenges the court’s legal authority to adjudicate the issues and claims raised in the complaint. A Rule 12(B)(1) motion must be granted when plaintiff has alleged causes of action which the court has no authority to decide. Salvation Army v. Blue Cross and Blue Shield of Northern Ohio (1993), 92 Ohio App.3d 571, 576; McHenry v. Industrial Commission (1990), 68 Ohio App.3d 56, 62. The plaintiff bears the burden of proving, by a preponderance of evidence, that the court possesses subject matter jurisdiction. O’Shea v. Fayard (August 14, 2003), Cuyahoga App. No. 81791, unreported, 2003 Ohio 4340, 2003 Ohio App. LEXIS 3841; Collins v. Hamilton County DHS (March 21, 2002), Franklin App. No. 01AP-1194, unreported, 2002 Ohio

1325, 2002 Ohio App. LEXIS 1291.<sup>2</sup> Under Ohio law, a motion to dismiss tort claims for lack of subject matter jurisdiction based on preemption, though filed after defendant's answer in violation of procedural rules, could nonetheless be considered by the trial court, as a federal preemption claim may be made at any time. Jones v. Shannon, et al. (2000), 139 Ohio App.3d 508, 510, 744 N.E.2d 776. When ruling on a 12(B)(1) motion, the trial court is not confined to the allegations of the complaint and may consider material pertinent to such inquiry without converting the motion into one for summary judgment. Southgate Development Corp. v. Columbia Gas Transmission Corp. (1976), 48 Ohio St.2d 211; Salvation Army, 92 Ohio App.3d at 577.

**B. The Scope of Preemption Under the ICCTA.**

Granting Plaintiffs the relief requested in the Complaint would be an inappropriate regulation of railroad operations that is preempted by the ICCTA. Federal law can preempt state or local law, pursuant to the Supremacy Clause, U.S. Const. art. 6, cl. 2, in various ways, including the following:

(1) express preemption where the intent of Congress to preempt state law is clear and explicit; (2) field preemption where Congress' regulation of a field is so pervasive or the federal interest is so dominant that an intent can be inferred for federal law to occupy the field exclusively; and (3) conflict preemption, where federal and state law so conflict that it is impossible for a party to comply with both simultaneously, or where enforcement of state law prevents the accomplishment of the full purposes and objectives of federal law.

Railroad Ventures, Inc. v. Surface Transp. Bd., 299 F.3d 523, 561 (6<sup>th</sup> Cir. 2002)(citing Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992); Friberg v. Kansas City S. Ry. Co., 267 F.3d 439, 442 (5th Cir.2001)).

---

<sup>2</sup> Copies of all unreported cases cited herein are attached for the Court's convenience.

In this case, the ICCTA preempts the state law claims in Plaintiffs' Complaint by express preemption. The ICCTA's express preemption provision, 49 U.S.C. § 10501(b), provides as follows:

(b) The jurisdiction of the Board over—

(1) transportation by rail carriers, and the remedies provided in this part [49 U.S.C. §§10101 et seq.] with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

*is exclusive.* Except as otherwise provided in this part [49 U.S.C. §§10101 et seq.], *the remedies provided* under this part [49 U.S.C. §§10101 et seq.] with respect to regulation of rail transportation *are exclusive and preempt the remedies provided under Federal or State law.*

49 U.S.C. §10501 (emphasis added). “To come within the preemptive scope of 49 U.S.C. 10501(B), these activities must be both: (1) transportation; and (2) performed by, or under the auspices of, a rail carrier.” Canadian Nat'l Railway Co. v. City of Rockwood, Docket No. 04-40323, 2005 WL 1349077, \*3 (E.D.Mich. June 1, 2005). The term “rail carrier” means “a person providing common carrier railroad transportation for compensation.” 49 U.S.C. § 10102(5). Additionally, the term “transportation” is expansively defined to include the following:

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, 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; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. § 10102(9).

Courts that have interpreted 49 U.S.C. § 10501(b) and considered its preemptive scope “have consistently found that the foregoing preemption clause is both clear and broad.” Columbiana Cty. Port Auth. V. Boardman Tp. Park, 154 F. Supp. 2d 1165, 1180 (N.D. Ohio 2001). The United States Court of Appeals for the Sixth Circuit has stated as follows:

it is manifestly clear that Congress intended to preempt the Ohio state statutes, and any claims arising therefrom, to the extent that they intrude upon the STB’s exclusive jurisdiction over “transportation by rail carriers” and “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State.”

Railroad Ventures, Inc., 299 F.3d at 562 (quoting 49 U.S.C. § 10501(b)). Further, the United States District Court for the Northern District of Ohio has stated that the “ICCTA also evidences the intent of Congress to preempt the field in which state law previously operated with respect to railroads.” Columbiana Cty. Port Auth., 154 F. Supp. 2d at 1180.

Courts outside of the Sixth District have echoed the sentiment that the preemptive scope of the ICCTA is extremely broad. In Wisconsin Central Ltd. v. The City of Marshfield, the court stated “it is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.” 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000)(quoting CSX Transp. Inc. v. Georgia Pub. Serv. Comm’n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)). In City of Auburn v. United States Government, the Ninth Circuit noted that “the Supreme Court repeatedly has recognized the preclusive effect of federal legislation in this area.” 154 F. 3d 1025, 1029. In Rushing v. Kansas City S. Ry. Co., the court found that “the clear and

manifest purpose of Congress when it enacted the ICCTA was to place certain areas of railroad regulation within the exclusive jurisdiction of the STB and to preempt remedies otherwise provided under federal or state law.” 194 F. Supp. 2d 493, 498 (S.D. Miss. 2001). Finally, the Fifth District has stated that the preemptive language of 49 U.S.C. §10501 is “so certain and unambiguous as to preclude any need to look beyond that language for congressional intent.” Friberg, 267 F. 3d at 443. The court in Friberg further observed that the “regulation of railroad operations has long been a federal endeavor..., and it appears manifest that Congress intended the ICCTA to further that exclusively federal effort...” Id.

The Surface Transportation Board has also recognized the preemptive effect of the ICCTA. The STB has stated that “[e]very court that has examined the statutory language has concluded that the preemptive effect of section 10501(b) is broad and sweeping, and that it blocks actions by states or localities that would impinge on the Board’s jurisdiction or a railroad’s ability to conduct its rail operations.” CSX Transp., Inc., 2005 STB LEXIS 134, \*16 (citing Friberg, 267 F. 3d at 443).<sup>3</sup>

<sup>3</sup> The STB opinion included the following list of citations as further evidence to support ICCTA preemption: City of Auburn, 154 F. 3d at 1029-31 (state and local environmental and land use regulation preempted); Wisconsin Cent. Ltd., 160 F. Supp. 2d at 1014 (attempt to use a state’s general eminent domain law to condemn an actively used railroad passing track preempted); Dakota, Minn. & E. R.R. v. State of South Dakota, 236 F. Supp. 2d 989, 1005-08 (S. S.D. 2002), *aff’d.* on other grounds, 362 F. 3d 512 (8th Cir. 2004) (revisions to state’s eminent domain law preempted where revisions added new burdensome qualifying requirements to the railroad eminent domain power that would have the effect of state “regulation” of railroads); CSX Transp. Inc., 944 F. Supp. at 1573 (state regulation of a railroad’s closing of its railroad agent locations preempted); Soo Line R.R. v. City of Minneapolis, 38 F. Supp. 2d 1096 (D. Minn. 1998) (local permitting regulation regarding the demolition of railroad buildings preempted); Cedarapids, Inc. v. Chicago, Cent. & Pac. R.R., 265 F. Supp. 2d 1005, 1013-14 (N.D. Iowa 2003) (ICCTA preemption applies broadly to operations on both main line and auxiliary spur and industrial track); Norfolk S. Ry. v. City of Austell, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236 (N.D. Ga. 1997) (local zoning and land use regulations preempted); Village of Ridgefield Park v. New York, Susquehanna & W. Ry., 750 A.2d 57 (N.J. 2000) (amended complaints about rail operations under local nuisance law preempted). CSX Transp., Inc., 2005 STB LEXIS 134, \*16-18 (STB 2005).

1. **State and Local Regulations that Prevent or Unreasonably Interfere with Railroad Lines and/or Railroad Operations Are Preempted.**

The Sixth Circuit has stated that “the ICCTA preempts ... Ohio state statutes ... to the extent that they intrude upon the jurisdiction of the STB with regard to the regulation of rail transportation.” Railroad Ventures, Inc., 299 F.3d at 561; see also Wisconsin Central Ltd., 160 F. Supp. 2d at 1013 (“It is clear that the ICCTA has preempted all state efforts to regulate rail transportation”). State or local actions and/or regulations “intrude” upon the Surface Transportation Board’s (hereinafter “STB”) jurisdiction and are thus preempted if they “would ‘prevent or unreasonably interfere with railroad operations.’” Buffalo Southern Railroad, Inc. v. Village of Croton-on-Hudson, 434 F. Supp. 2d 241 (S.D.N.Y. 2006)(quoting Maumee & W. R.R. Corp., STB Fin. Docket No. 34343 (S.T.B. March 3, 2004)); see also Green Mtn. R.R. Corp. v. Vermont, Docket No. 01-CV-00181JGM, 2003 WL 24051562, \*5 (D. Vermont Dec. 15, 2003)(“Court and agency precedent interpreting the statutory preemption provision have made it clear that, under this broad preemption regime, state and local regulation cannot be used to veto or unreasonably interfere with railroad operations”).

The broad preemptive reach of 49 U.S.C. § 10501(b) extends beyond preempting state and local regulations that unreasonably interfere with rail carriers’ *rail lines*. “The statutory language indicates an express intent on the part of Congress to preempt the entire field of railroad regulation, including activities related to but not directly involving railroad transportation.” Grafton and Upton Railroad Co. v. Town of Milford, 337 F. Supp. 2d 233, 238 (D. Mass. 2004). Activities related to but not directly involving railroad transportation “logically includes the yard, property, facilities, and any intermodal equipment used in connection with a railroad, or related to the movement of passengers or property.” Green Mtn.

R.R. Corp., 2003 WL 24051562 at \*7 (quoting Soo Line R.R. Co. v. City of Minneapolis, 38 F. Supp. 2d 1096, 1099 (D.Minn. 1998)).

2. **The ICCTA also Preempts Civil Actions Seeking Damages or Equitable Relief.**

It has been repeatedly held that ICCTA's preemption clause applies not only to state statutes and regulations which have the effect of regulating interstate rail operations, but also to civil actions brought in state court by private parties seeking equitable or monetary relief based on state common law. Courts have consistently applied ICCTA preemption to dismiss claims, like those asserted herein, brought by property owners against railroads based on the alleged misuse of rails running over or adjacent to the plaintiffs' property. See Friberg, supra; Suchon v. Wis. Cent. Ltd., No. 04-C-0379-C, 2005 WL 568057 (W.D. Wis. Feb. 23, 2005); Maynard v. CSX Transp., Inc., 360 F. Supp. 2d 836, 842 (E.D. Ky. 2004); Guckenberger v. Wis. Cent. Ltd., 178 F. Supp. 2d 954 (E.D. Wis. 2001); Rushing, supra. Similarly, in Cannon, et al. v. CSX Transp. Inc., 2005 WL 77088 (Ohio App. 8 Dist.), the court dismissed plaintiffs' claims seeking damages for trespass, private nuisance, and negligence against the railroad in connection with property damage allegedly caused by excessive railway vibrations, as such claims were preempted by ICCTA. In finding that plaintiffs' claims were properly dismissed as against the railroad, the court stated that,

Congress and the courts have recognized a need to regulate railroad operations at the federal level, and Congress' authority under the Commerce Clause is well established. State statutes and local ordinances often do not survive an ICCTA preemption challenge, and likewise, courts have consistently found that common law claims regarding railroad operations are also preempted by the ICCTA...it is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations. Id. at 3.

In dismissing such claims, courts recognize that "a state may regulate through an award of damages under a common law claim as effectively as it may regulate by some form of

preventative relief, and thus a state common law cause of action qualifies as 'regulation' for purposes of section 10501(b)." Maynard, 360 F. Supp. 2d at 840 (citing Guckenberg, 178 F. Supp. 2d at 958; see also, Pejepscot Indus. Park, Inc. v. Maine Cent. R.R. Co., 297 F. Supp. 2d 326, 333 (D. Me. 2003) ("awards of damages pursuant to state tort claims may qualify as state 'regulation' when applied to restrict or burden a rail carrier's operations."))

Some of the cases cited above bear a remarkable resemblance to the case at bar. In Maynard, a case brought before the United States District Court for the Eastern Division of Kentucky, plaintiffs alleged that CSX abused its railroad easements by permitting a side track located on plaintiffs' property to be "wrongfully, negligently, and carelessly" blocked by its trains for excessive time periods. 360 F. Supp. 2d at 838. According to plaintiffs' complaint, the blockage denied plaintiffs' access to their property. Id. Plaintiffs also alleged that CSX negligently permitted drainage to escape onto plaintiffs' property, further diminishing its value. Plaintiffs sought both injunctive relief and monetary damages. Id. The court, however, dismissed plaintiffs' complaint, finding their state law claims preempted by the ICCTA. Id. at 843-44. The court found that the ICCTA provided the STB with exclusive jurisdiction over claims involving railroad operations, and that plaintiffs were seeking to use state common law to regulate the manner in which defendant conducted its railroad operations. Id. at 843.

In Suchon, plaintiff sued the defendant railroad for damages for nuisance and trespass. 2005 WL 568057, \*1. Plaintiff alleged that defendant's railroad operations interfered with the operation of his body shop business. Specifically, he alleged that dust from defendant's trains fell on newly painted cars. Id. He also complained about hazardous materials from defendant's railcars spilling onto his property. Id. In holding that plaintiff's nuisance claim was preempted, the court stated that "[a]llowing plaintiff to obtain a monetary or injunctive remedy by

application of the state's nuisance law to defendant's actions is not significantly different from allowing the state to impose restrictions on defendant through laws and regulations. In either case, the effect would be the same. Defendant would be restricted in the use of its property, in derogation of the ICC Termination Act." *Id.* at \*4.

In *Rushing*, plaintiff homeowners sued the neighboring defendant railroad in state court alleging that the defendant was operating its trains and switching yard in a manner which created a private nuisance. 194 F. Supp. 2d at 496. Defendant removed the action to federal court and, while the action was pending, plaintiffs filed a second lawsuit in state court alleging that the defendant negligently operated its switch yard in a manner that caused plaintiff damages. *Id.* Defendant also removed the second case to federal court, and the two cases were consolidated. *Id.* at 497. Defendants then moved to have the consolidated cases dismissed on the grounds that the STB had exclusive jurisdiction to hear the claims. *Id.* Analyzing the issue of preemption, the court found that plaintiffs were attempting to use preempted state common law claims of negligence and nuisance "to impose regulations on the defendant regarding the manner in which it operates its switchyard thereby potentially interfering with interstate railroad operations." *Id.* at 501.

Finally, in *Friberg*, plaintiffs brought a lawsuit against the defendant railroad claiming that the railroad's practice of stopping its trains and blocking access to plaintiffs' nursery resulted in the nursery's loss of business. 267 F.3d at 440-41. Plaintiffs' suit alleged both negligence and negligence *per se* based on the violation of a Texas "anti-blocking" statute. *Id.* at 441. After a jury trial resulted in the verdict for plaintiffs and the defendant railroad appealed, the Fifth Circuit held that plaintiffs' state law claims were preempted by the ICCTA. The court found "the all-encompassing language of the ICCTA's preemption clause [does not] permit the

federal statute to be circumvented by allowing liability to accrue under state common law..." Id.  
at 444.

The foregoing cases and other authorities amply demonstrate the broad preemptive effect of ICCTA on state law claims, like those in the case at bar, alleging abuse or misuse of railroad easements. Such claims have consistently been held to be preempted.

**C. Characterizing Plaintiffs' Claims as Claims for Breach of the Easement Agreements Does Not Avoid ICCTA Preemption.**

Even if Plaintiffs' claims are construed as claims for breach of the LTV and PLE Easement agreements, Plaintiffs' claims do not avoid ICCTA preemption. An easement is a property right that includes "an interest in the land of another which entitles the owner of the easement to a limited use of the land on which the interest exists." Columbiana County Port Auth., 154 F. Supp. 2d at 1175 (citing 36 Ohio Jurisprudence 3d 386, Easements and Licenses, Section 1, Cincinnati, Hamilton & Dayton Ry. Co. v. Wachter (1904), 70 Ohio St. 113, 118). Characterizing Plaintiffs' claims as breach of easement agreement claims does not circumvent ICCTA preemption because Courts have consistently applied ICCTA preemption to claims based on alleged misuse of railroad lines or easements. Maynard, supra; Friberg, supra.

The Eastern District of Kentucky's decision in Maynard is directly on point. As noted above, in Maynard, plaintiffs, the owners of three tracks of real property over which CSX acquired railroad easements, sued CSX alleging that CSX wrongfully, negligently, and carelessly permitted a sidetrack on plaintiffs' property to be blocked for excessive time periods. Plaintiffs also alleged that CSX's use of the sidetrack permitted drainage to escape onto plaintiffs' property, further diminishing its value. Maynard, 360 F. Supp. at 838. Defendant CSX moved for summary judgment contending that plaintiffs' state law claims were preempted by the ICCTA. Plaintiffs responded to defendant's motion for summary judgment by arguing that CSX

“mis-characterized” plaintiffs’ action as a nuisance action. *Id.* Plaintiffs in Maynard argued, just as Plaintiffs argue herein, that the case instead “involves the enforcement of basic contract rights by a state court in matters where right-of-ways were granted by land owners...” *Id.* After analyzing the ICCTA’s preemption clause and cases applying ICCTA, the district court disagreed with plaintiffs, finding that the allegations in the complaint, including Plaintiffs’ prayer for relief, “compelled the Court to conclude that this action is not one brought in contract, as suggested by Plaintiffs, but rather, is one alleging common law negligence and nuisance claims.” *Id.* at 841. The court further held that plaintiffs’ claims were preempted. In finding plaintiffs’ claims preempted, the court cited the Sixth Circuit’s decision in R.R. Ventures, Inc. v. Surface Transp. Bd., 299 F. 3d 523 (6<sup>th</sup> Cir. 2002) which, while not directly on point, cited with approval the Fifth Circuit’s decision in Friberg, supra, a case closely on point to the case at bar. *Id.* at 841-42. The court in Maynard also expressly found that “ICCTA preemption is not preconditioned upon...an effect on interstate commerce...” *Id.* at 843.

In addition to the reasons set forth in Maynard, Plaintiffs’ claims for relief are preempted by the ICCTA because they seek to restrict, impair, or impede the use of Defendants’ railroad easements over Plaintiffs’ property through injunctive relief. These are the types of claims which impact railroad operations and fall clearly within the scope of the ICCTA. See PCI Transp., Inc. v. Fort Worth & W.R.R. Co., 418 F. 3d 535, 542-43 (5<sup>th</sup> Cir. 2005)(concluding that claims were preempted by the ICCTA because “the injunctive relief PCI seeks would regulate the operation of FWR’s switching yard and would therefore fall squarely under §10501(b)”).

**D. Notice of Referral to the Surface Transportation Board.**

As shown above, this Court lacks subject matter jurisdiction and should dismiss this case. However, in the event the Court finds that it in fact has subject matter jurisdiction in the instant

matter, Defendants request the Court to stay all proceedings and refer<sup>4</sup> this case to the Surface Transportation Board ("STB") for resolution, pursuant to the doctrine of primary jurisdiction. Defendants are rail carriers' subject to the jurisdiction of the STB, pursuant to 49 U.S.C. §10101, *et seq.* The STB is the administrative agency charged with expert skill and knowledge of the interstate transportation industry, including rail carriers. F.P. Corp. v. Ken Way Transp., Inc., 821 F. Supp. 1032, 1036 (E.D. Pa. 1993) (referring to the Interstate Commerce Commission, the STB's predecessor); see also 49 U.S.C.A. § 10501 (West 1999).

Defendants argue that the issues in this case fall within the primary jurisdiction of the STB. Courts developed the doctrine of primary jurisdiction to avoid conflicts between the courts and administrative agencies charged with particular regulatory duties. Untied States v. Western Pacific R.R. Co., 352 U.S. 59, 63 (1956). The doctrine of primary jurisdiction applies to claims that are originally cognizable in a federal court. *Id.* at 64. Primary jurisdiction comes into play when judicial enforcement of a claim requires the resolution of issues which, under the regulatory scheme, have been placed within the special competence of an administrative body. *Id.* In such a case, the court should suspend the case pending referral of such issues to the administrative body<sup>5</sup>. *Id.* In general, a court should refer a matter to an administrative agency for resolution if it appears that the matter involves technical or policy considerations that are beyond the court's ordinary competence and within the agency's particular field of expertise, or where there is the possibility of contradictory rulings from the agency and the court. MCI Communications Corp. v. AT&T, 496 F.2d 214, 220 (3d Cir. 1974). The STB has recognized

<sup>4</sup> The term "referral" as used herein describes the procedure by which the district court stays further action in a case "so as to give (the party) a reasonable opportunity within which to apply to (the STB) for a ruling." Reiter v. Cooper, 507 U.S. 258, 268 n.3 (1993).

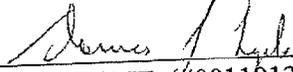
<sup>5</sup> Referral of an issue to an administrative agency does not deprive the court of jurisdiction. Reiter, 507 U.S. at 267. The court has the discretion to either retain jurisdiction, or if the parties would not be unfairly disadvantaged, to dismiss the case. *Id.* Furthermore, the court retains exclusive jurisdiction to enforce or set aside in whole or part any order of the STB arising out of the referral. 28 U.S.C. §1336 (1994); Ametek, 104 F.3d at 561.

the preemptive effect of the ICCTA. The STB has stated that “[e]very court that has examined the statutory language has concluded that the preemptive effect of section 10501(b) is broad and sweeping, and that it blocks actions by states or localities that would impinge on the board’s jurisdiction or a railroad’s ability to conduct its rail operations.” CSX Transp., Inc. 2005 STB LEXIS 134, \* 16 (citing Friberg, 267 F.3d at 443). Defendants argue that the claims involved in this case fall within the primary jurisdiction of the STB and therefore all proceedings should be stayed and referred to the STB.

### **III. CONCLUSION**

The claims in Plaintiffs’ First Amended Complaint are preempted by the ICCTA and should be adjudicated before the Surface Transportation Board. Plaintiffs’ claims, in essence, are tort and property claims that would directly interfere with and impact the conduct and continued service of Defendants’ interstate railroad operations. Moreover, Plaintiffs seek injunctive relief, and the ICCTA completely preempts any attempt by state courts to grant such equitable relief as it would constitute impermissible state regulation of railroad operations. Because such regulation is exclusively federal, Plaintiffs’ claims are completely preempted. Accordingly, Defendants respectfully request the Court to grant Defendants Motion to Dismiss whereby Plaintiffs may file a claim before the STB or in the alternative Defendants’ request that the Court stay all proceedings and provide a Notice of Referral to the Surface Transportation Board to adjudicate Plaintiff’s claim.

Respectfully Submitted,

  
C. SCOTT LANZ (#0011013)  
THOMAS J. LIPKA (#0067310)

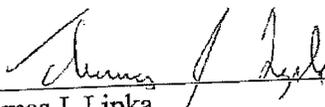
Attorneys for Defendants  
MANCHESTER, BENNETT, POWERS  
& ULLMAN

201 E. Commerce Street, Atrium Level Two  
Youngstown, Ohio 44503  
Telephone (330) 743-1171  
Facsimile (330) 743-1190

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was sent via U.S. Mail this 1 day of  
May, 2009 to:

Christopher R. Opalinski, Esq.  
F. Timothy Grieco, Esq.  
Eckert, Seamans, Cherin & Mellott, LLC  
44th Floor, 600 Grant Street  
Pittsburgh, Pennsylvania 15219  
Attorneys for Plaintiffs'

  
Thomas J. Lipka

IN THE COURT OF COMMON PLEAS  
MAHONING COUNTY, OHIO

ALLIED ERECTING AND  
DISMANTLING CO., INC.,

Plaintiffs,

v.

THE OHIO CENTRAL RAILROAD,  
INC., et al.,

Defendants.

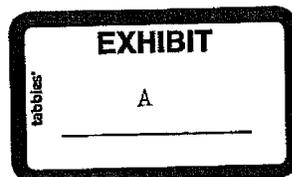
CASE NO. 2006 CV 00181

JUDGE MAUREEN A. SWEENEY

**AFFIDAVIT OF TERRY  
FEICHTENBINER SUPPORT OF  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

NOW COMES, Terry Feichtenbiner (hereinafter "Affiant"), and being first duly sworn,  
deposes and says as follows:

1. I, Terry Feichtenbiner (hereinafter "Affiant"), have personal knowledge of the facts set forth in this Affidavit.
2. Summitview, Inc. is an Ohio corporation which through October of 2008 wholly owned eleven Ohio corporations engaged in railroad operations in Ohio and Pennsylvania.
3. 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 (hereinafter "Defendants"), were six of the Ohio corporations wholly owned by Summitview, Inc.
4. I am currently the General Manager, of the Youngstown Division of the Ohio Central Railroad, Inc.
5. Each of the above named Defendants are Class III rail carriers registered with the Surface Transportation Board.
6. Each of the above named Defendants engage in interstate commerce.



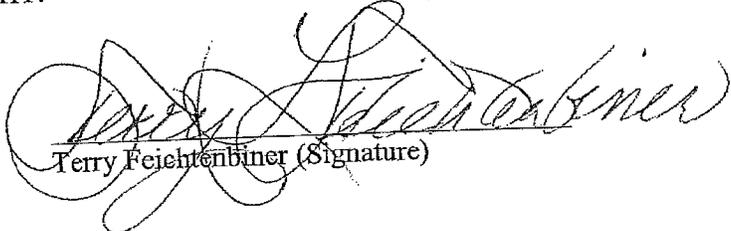
7. The Defendants acquired the rights to an easement for use of railroad tracks over certain real property owned by Plaintiff Allied Industrial. This Easement is identified as the LTV Easement in Plaintiff's Amended Complaint.

8. The Defendants acquired the rights to an easement for the use of railroad tracks over certain real property owned by Plaintiff Allied Erecting. The Easement is identified as the P & LE Easement in Plaintiff's Amended Complaint

9. The use of the above easements by any of the Defendants was and is in furtherance of Interstate Commerce.

FURTHER AFFIANT SAYETH NAUGHT.

Date: \_\_\_\_\_

  
Terry Feichtenbiner (Signature)

STATE OF OHIO )

COUNTY OF Mahoning )

) SS:

Sworn to before me and subscribed in my presence this 14 day of April

2009.

  
Notary Public

THOMAS J. LIPKA, ATTORNEY AT LAW  
Notary Public-State of Ohio  
My Commission Has No Expiration Date

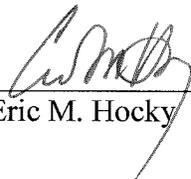
CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2009, a copy of the foregoing Reply of Respondents upon the following persons by US first class mail, postage prepaid:

Richard Streeter, Esq.  
Barnes & Thornburg, LLP  
Suite 900  
750 17<sup>th</sup> Street, NW  
Washington, DC 20006-4675

Christopher R. Opalinski, Esq.  
F. Timothy Grieco, Esq.  
Jacob C. McCrea, Esq.  
Eckert Seamans Cherin & Mellott, LLC  
44<sup>th</sup> Floor, 600 Grant Street  
Pittsburgh, PA 15219

John D. Heffner, Esq.  
John D. Heffner, PLLC  
1750 K Street, NW  
Suite 200  
Washington, DC 20006

  
Eric M. Hocky