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Before the

SURFACE TRANSPORTATION BOARD

STB Docket No. FD 35316

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

JOINT SUPPLEMENTAL COMMENTS OF ALLIED ERECTING AND
DISMANTLING, INC. AND ALLIED INDUSTRIAL
DEVELOPMENT CORPORATION

By Decision served August 6, 2014, the Board, acting through the Director, Office of Proceedings, recognized that "[t]he unique circumstances of this proceeding warrant a substantive response to Allied's arguments to aid the Board in determining whether reopening is appropriate in this case." In order to develop the record, Respondents[1] were directed to complete their reply to Allied's arguments. On September 15, 2014, Respondents filed a "Supplemental Reply of Respondents to Petition to Reopen and Supplement the Record" (hereinafter "Supplemental Reply"). Because the Supplemental Reply contains various misleading claims and omissions of highly relevant facts, Allied has sought permission to file this Supplemental Statement in rebuttal.

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[1] Respondents consist of the six railroad members of the "Ohio Central Railroad System," namely Mahoning Valley Railway Company (MVRY), Ohio & Pennsylvania Railroad Company (OHPA) Ohio Central Railroad, Inc. (Ohio Central), Warren & Trumball Railroad Company, Youngstown & Austintown Railroad, Inc. and Youngstown Belt Railroad Company, along with the railroads' direct and indirect corporate parents, Summit View, Inc. (Summit View) and Genessee & Wyoming Inc. (GWI).

The 1982 ICC Certificate of Public Convenience granted to MVRY did not authorize operations over the industrial tracks located within Republic Steel's facility that were subsequently acquired by Allied in 1992.

In their Supplemental Reply, Respondents say that "[t]he essential finding that Allied seeks to reopen is the Board's finding that the stopping and storing of cars by MVRY … is not prohibited by or a violation of the LTV easement."[2] That assertion is baseless and misleading. The essential finding that Allied seeks to reopen is the Board's erroneous conclusion that the tracks that Allied purchased from LTV in 1992 "were encompassed in the ICC's 1982 grant of authority to MVRY."[3] That conclusion serves as the basis for the determination that Allied's private tracks are subject to the Board's jurisdiction rather than falling within the scope of 49 U.S.C. § 10906, which squarely places Allied's tracks beyond the Board's authority.

The bottom line is that the extensive system of in-plant railroad tracks involved in this proceeding (whether they are labeled as "main line", switching or spur) were assembled and operated by Republic Steel long before it was merged into LTV, and were never intended to be part of the national rail system.[4] Moreover, when LTV sold Allied the parcel of land located to the east of the Center Street Bridge and south of the Mahoning River, the various track

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[2] Supplemental Reply at 3.

[3] Slip op. at 14.

[4] Attachment A, which is a map of Republic Steel's Youngstown Division facility (dated 1962), is filed herewith to allow the Board to comprehend the in-plant railroad system that was developed by Republic Steel at that location. Today, nothing is left of the facility east of the Center Street Bridge. Only the remnants of a portion of the Electric Weld Tube Mill and the Locomotive Shop remain to the west. Some of the tracks have also been removed.

segments located within that parcel remained outside of the national rail system.

As Allied has demonstrated, because Allied's private tracks were part of Republic Steel's extensive in-plant railroad track system located to the east of the Center Street Bridge and south of the Mahoning River, they were not included in the tracks that were included in the ICC's 1982 grant of operating authority to MVRY. Hence, all findings that are based on the conclusion that the tracks were included in the ICC's 1982 certificate must be reversed.

Allied respectfully submits that Respondents have wholly failed to counter Allied's evidence regarding the track system that was involved in MVRY's 1981 application. Nor have Respondents been able to discredit Allied's interpretation of the supporting shipper evidence in that proceeding. Therefore, the Board must reverse its prior determination that the ICC granted MVRY common carrier authority to operate over Republic Steel's tracks that are now owned by Allied. In addition, consistent with the provisions of 49 U.S.C. § 10906, the Board should find that it has no authority over operations conducted over the private, industrial tracks that are owned by Allied.

In the first place, it is well settled that in-plant operations over private tracks that are not part of the National Transportation Rail System do not require operating authority from the Board. Nor did Allied require ICC authority to acquire segments of industrial tracks from LTV or to grant LTV an easement in order to consented to MVRY's continued provision of service to

LTV's Electric Welded Tube Mill over its private tracks. In addition, MVRY did not need ICC or STB authority under § 10901 to provide service for LTV over LTV's tracks. Instead, MVRY's operations over LTV's and Allied's private tracks pursuant to a January 1, 1990 Lease between LTV and MVRY and the 1992 LTV Easement granted by Allied fell within the purview of § 10906.[5]

The Board lacks statutory authority over the tracks involved in this proceeding, as well as private contracts pertaining thereto.

In the Supplemental Response, Respondents have chosen to ignore the clear wording of section 10906 and its relationship with Section 10501(b)(2). As was carefully explained in *Port City Props. v. Union Pac. R.R.,* 518 F.3d 1186, 1188 (10th Cir. 2008):

> "When 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

[5] The January 1, 1990 Lease between the LTV Steel Company, Inc. and The Mahoning Valley Railway Company, which is reproduced in Respondents Reply, App. A, Ex. A-11, granted MVRY "a license to cross and access Lessor's lands in Mahoning County, Ohio for all lawful purposes in connection with this Lease; provided, however, that in the exercise of its rights under this license, [MVRY] shall not unreasonably interfere with Lessor's operations and shall abide by all of Lessor's applicable policies, procedures, rules and regulations." LTV expressly reserved "the right to use all or any portions of the railroad tracks included in the Leased Premises for its own purposes, and to construct, maintain and use crossings over any part of the railroad tracks, switches and sidings at, above or under grade at such points as Lessor[...] may desire for the convenient operation or improvement of its businesses". In Exhibit A to the Lease, it was further agreed that the leased track was "to be used by the Mahoning Valley Railway Company for service to LTV Tubular Products Company, Electric Welded Tube Mill".

> management." *Cities of Auburn and Kent,* 2 S.T.B. 330, 1997 WL 362017 at *7 (1997).

Plainly, given the absence of any Section 10901 operating authority to MVRY to conduct operations over the LTV tracks, the Board lacks authority over the operation of those tracks. Furthermore, because the underlying issue is contractual in nature, there is no Federal preemption of Allied's attempt to enforce the provisions of the easement and eliminate any future obstruction of Allied's ongoing efforts to redevelop the property that it acquired from LTV.

Given MVRY's failure to obtain operating authority to provide rail service over any of the lines located on Allied's property, either to the east or west of the Center Street Bridge, the Board has never had any authority over Allied's private tracks. Hence, no unauthorized discontinuance under federal law would result from Allied's pursuit of its state law remedy to terminate the LTV Easement pursuant to the state law "merger by ownership" doctrine or to otherwise enforce the terms and conditions of that easement that require MVRY to not interfere with Allied's operations on its property. Any holding to the contrary would violate the explicit provisions of 49 U.S.C. § 10906.

Respondents' reliance on the Board's reasoning in *Grafton & Upton Railroad Company – Petition for Declaratory Order,* STB Docket No. FD 35776 (served January 27, 2014) is misplaced.[6] Respondents correctly recite the Board's statement that "G&U's construction and use of the Parcel for rail

[6] Response at 9.

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."*[7]

In this case, Allied is not seeking to impose any governmental regulations on MVRY or to interfere with any lawful use of Allied's private tracks. Instead, it is simply trying to enforce the contract that underlies MVRY's presence on those tracks. Of course, because LTV has shut down all of its operations and because no other shippers are located on the property, the underlying purpose of the easement has expired.

There is no evidence that MVRY has ever sought authority from the ICC or the Board to operate over Allied's private tracks.

The bottom line is that Respondents have failed at all stages of this proceeding to show that MVRY at any time sought additional ICC or Board authority to extend its common carrier freight operations over any of the Republic Steel/LTV tracks that Allied acquired from LTV in 1992. As David Collins, the current President of the Ohio Central Railroad System, has

[7] Id. at 9 (the italicized portion reflects the omitted language).

candidly admitted, he is unaware of any authority issued by the ICC or the Board that permitted MVRY to operate over the LTV Easement.[8] Nor has MVRY's latest witness, Leonard Wagner, who was employed as MVRY's former Manager of Marketing from 2001 to 2009, been able to identify any ICC or STB authority to operate as a common carrier over Allied's private tracks that are covered by the LTV Easement that Allied granted to LTV in 1992.

Because Allied's evidence demonstrated that the ICC's grant of authority did not encompass the tracks that Allied purchased in 1992, there is no way to avoid the Board's uncontested legal conclusion that "***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***."[9] Given the Board's conclusion, Respondents were put on notice that they have the burden of identifying some operating authority, granted by the ICC or the Board, that would authorize MVRY to conduct lawful common carrier operations over the former Republic Steel tracks that were never part of the National Transportation System and, since 1992, have been privately owned and used by Allied in furtherance of its commercial endeavors. As the Supplemental Reply reflects, Respondents are unable to identify any

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[8] Allied Opening Statement, Ex. B, Collins Deposition, p. 37. Although not directly involved in the instant proceeding, the same is true with respect to the tracks that are located to the west of the Center Street Bridge.

[9] Slip op. at 10 (emphasis added).

operating authority, issued by either the ICC or the Board, other than the 1982 certificate of public convenience and necessity.

The Conrail Agreements Did Not As A Matter Of Law Constitute A Grant Of Operating Authority.

In an attempt to avoid the consequences of MVRY's failure to obtain additional operating authority beyond the 1982 ICC authority, Respondents point to the September 14, 1990 Agreement between Consolidated Rail Corporation and Mahoning Valley Railway Company and the Supplemental Agreement, dated December 10, 1990. According to Respondents, as a result of the Supplemental Agreement, "MVRY was given the right to use the Conrail tracks in Haselton Yard in order to service the CASTLO industrial park" that is located in Struthers.[10] Operations from LTV's facilities and the Wabash Yard, which were located north of the Mahoning River, through the Hazelton Yard to reach CASTLO would not involve the tracks that are involved in this proceeding.

More importantly, there is no indication that MVRY ever sought approval from the ICC to operate over the Conrail lines. Of course, because Conrail's authorization to operate over its track is not the legal equivalent of a grant of ICC authority, the Board should summarily reject Respondents' attempt to equate the Conrail Agreements with ICC authority, particularly when MVRY

[10] Supplemental Reply at 6.

opted not to seek ICC approval of the trackage rights pursuant to ¶ 5 of the Supplemental Agreement. As stated therein:

> Should implementation of this Supplemental Agreement require the taking of any action by [MVRY] and/or the Interstate Commerce Commission under 49 U.S.C. Sections 10505, 11343 or 11344, [MVRY], at its own cost and expense, will initiate and thereafter diligently prosecute such action and this Supplemental Agreement shall become effective on the date User commences operating over the Subject Trackage for the purpose of accessing Castlo Industrial Park (hereinafter referred to as the "Commencement Date"). …In the event action under such sections is not required, the Commencement Date shall be the date agreed upon by the parties hereto as evidenced by an exchange of correspondence referred to above.[11]

Having failed to receive ICC or Board approval of the trackage rights, MVRY cannot rely in any respect on the Conrail Agreements to carry its burden of proof in this matter. Simply put, trackage rights over Conrail's lines would not bestow operating rights over the tracks located within the former Republic Steel facility on the south side of the Mahoning River.

Ohio Central's claims of good faith reliance are irrelevant and immaterial.

Respondents next say that Summit View relied on Cuyahoga Valley Railway Company and MVRY representations and warrants to Summit View "that MVRY had all necessary governmental authority to operate as it had been operations."[12] The representations to which Respondents refer are set out in § 3.2.1 of the *Stock Purchase Agreement Among The Mahoning Valley Railway*

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[11] Respondents' Appendix A, A-9, at 2.
[12] Id.

Company and The Cuyahoga Valley Railway Company and Summit View, Inc., dated as of March 30, 2001.[13] Those representations, as herein relevant, read as follows:

> the Company [i.e. MVRY] has … all authorizations, licenses and permits necessary to own and operate its properties and to carry on its businesses as now conducted, except where the failure to hold such authorizations, licenses and permits would not have a material adverse effect upon the financial condition of the Company.

Plainly, there is nothing in the literal wording that reflects any claim that the MVRY had any ICC or STB authority to perform freight operations as a common carrier by rail over LTV's or Allied's private tracks. Instead, that representation does nothing more than confirm that MVRY held some ICC authority to operate the lines north of the Mahoning River and in Struthers to the east of Youngtown and that such operations were lawfully authorized by the ICC and the STB. However, there is nothing in the § 3.2.1 representations that suggests Cuyahoga was confirming any ICC or STB operating authority over the privately held industrial tracks then owned by LTV located west of the Center Street Bridge or the industrial tracks owned by Allied east of the same bridge.

Summit View's post hoc "reliance" on Cuyahoga's contractual representations cannot overcome the lack of due diligence reflected by Summit View's apparent failure in 2001 to review the 1982 certificate of authority and

[13] Allied Opening Statement, Exhibit H.

the underlying documentation. In any event, Allied cannot be faulted for any imagined shortcomings in Cuyahoga's representations.

Summit View's § 11323 Exemption Proceeding Had No Impact On Allied's Tracks Or On MVRY's Operating Authority. Summit View's § 11323 exemption proceeding involved a stock transfer that permitted Summit View to acquire control of MVRY and nothing more. As explained in Summit View's Verified Petition for Exemption in F.D. No. 34026, *Summit View, Inc. – Control – Mahoning Valley Railroad Company – Exemption from 49 U.S.C. § 11323,* "[w]hile ownership of MVRC would change, the nature and scope of its operations – including in particular the frequency of service – will remain the same or improve."[14] In other words, to the extent that MVRY was previously engaged in unregulated switching services for LTV, nothing was being changed as a result of the transaction. The same is true of MVRY's common carrier operations conducted pursuant to its 1982 certificate of public convenience and necessity.

Even if MVRY may have unlawfully performed some common carrier operations over LTV's and Allied's private tracks, those unlawful operations did not alter the basic nature of the tracks or their ownership.

Respondents next claim that when Summit View acquired stock ownership of MVRY in 2001, "it understood in good faith based on its review of the MVRY's operations and the representation of LTV, that MVRY was using at least a portion of the LTV Tracks as main line tracks, handling business for

[14] Verified Petition at 3-4.

LTV to and from connecting carriers and participating in the route (and charging the connecting carriers and not LTV)".[15] Respondents also say that "MVRY believed that MVRY was operating a portion of the tracks (in particular No. 3 and 4 Mains, and track 239 which connected the Nos. 3 and 4 Mains) as common carrier main line tracks, with the remainder of the tracks covered by the LTV Easement being treated as plant and yard tracks."[16] Allied respectfully submits that what MVRY may have "believed" is no substitute for adequate due diligence. Labels applied to the in-plant industrial tracks by Republic Steel and subsequently carried forward by LTV and Allied are of no legal significance whatsoever.

As explained in *Nicholson v. I.C.C.,* 711 F.2d 364, 367 (D.C. Cir. 1983), *cert denied*, 464 U.S. 1056 (1984), the intended use of track is determinative, *not* the label or cost of the segment. In this case, there was never any intent upon the part of the owners to change the status of private industrial tracks to anything else. Allied's repeated objections to MVRY's abusive behavior that disrupted, impacted and adversely interfered with Allied's private operations over its tracks demonstrates that Allied had no intent to allow its tracks to be used for any purpose other than those covered by its contract with LTV. Stated in slightly different terms, whether a segment of track is a "railroad line" or an

[15] Supplemental Reply at 6 citing the Verified Statement of Leonard Wagner.

[16] V. S. Wagner at 2, ¶ 7.

exempted track turns on the intended use of the track segment, not on the label. In short, Respondents' focus on labels is meaningless.

Respondents also claim that MVRY was "handling business for customers in the CASTLO industrial part to Haselton Yard, and through Haselton Yard and across the LTV Tracks for interchange with CSXT."[17] There is no question that MVRY could offer lawful common carrier service to shippers in the CASTLO industrial park pursuant to its 1982 certificate and that it had authority to interchange with the various railroads that operated in the area.

However, any use of Allied's private tracks to perform common carrier service for CASTLO customers would appear to have been beyond the scope of MVRY's certificate. Moreover, because the easement that Allied granted to LTV did not contemplate the extension of service to any entity other than LTV, such operations would violate the terms of the easement and the underlying lease agreement.

If it is assumed that MVRY actually provided common-carrier rail service over LTV's private tracks to shippers other than LTV, such operations would have required MVRY to obtain appropriate operating authority. There is no avoiding the long line of precedents that authority issued by the ICC (and now the Board) is required under section 10901 for a carrier to operate as a common carrier over private track, when the carrier holds itself out by tariff or

[17] Respondents' Supplemental Reply at 6.

otherwise to serve other shippers for compensation.[18] *See, e.g., New York Central Railroad Co. v. Southern Railway Co.,* 226 F. Supp. 463, 471 (N.D. Ill. 1964), *aff'd,* 338 F.2d 667 (7th Cir. 1964), *cert. denied*, 380 U.S. 954 (1965), *reh'g denied,* 381 U.S. 907 (1965) (*New York Central*)(citing *Practices Affecting Dillonvale & Smithfield Ry.,* 229 I.C.C. 687 (1938); *Northern Pac. Ry. Operation,* 261 I.C.C. 631 (1946); *Acquisition of Line by Iberia & Vermilion R. R.,* 111 I.C.C. 660 (1926)). *See also, B. Willis, C.P.A. – Petition for Declaratory Order,* F.D. No. 34013 (STB served October 3, 2001), *aff'd sub nom. B. Willis, C.P.A. v. S.T.B.,* 2002 WL 31684796, 51 F.App'x 321 (D.C. Cir. 2002), *cert. denied,* 540 U.S. 811 (2002).

As the Board has recently confirmed, "[p]rivate track is not considered part of the national rail system even if a common carrier operates on the track, as long as the common carrier 'operates on the private track exclusively to serve the owner of the track pursuant to a contractual arrangement with that owner.'" *V&S Railway, LLC—Petition for Declaratory Order—Railroad Operations in Hutchinson, Kan.,* FD 35459, slip op. at 8 (STB served July 12, 2102), *quoting Devens Recycling Ctr., LLC—Petition for Declaratory Order,* FD 34952, slip op. 2 (STB served Jan. 10, 2007).

Even if operations by a rogue tenant railroad may morph into operations that may require Board approval under 10901, unlawful operations in the absence of § 10901 authority do not per se convert privately owned industrial

[18] Formerly Section 1(18).

tracks into regulated tracks. This underlies the Board's uncontested statement that "*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.*"[19] Any other result would raise substantial issues of due process and unconstitutional takings as the owner of the private tracks would be deprived of the substantial rights conveyed by §10906, including the right to control operations over its private track by requiring the offending tenant carrier to discontinue unauthorized services that are shown to be beyond the scope of an easement or the underlying contract that provides the *sole* basis for the tenant carrier's ability to occupy the privately held tracks.

This is particularly true in instances such as this where (1) LTV leased the tracks to MVRY for "all *lawful* purposes in connection with this Lease"[20]; and (2) Allied thereafter granted the underlying easement to LTV so as to allow MVRY to cross and access Allied's lands for the same *lawful* purposes. There is nothing to suggest that Allied intended to authorize the use of the tracks for any unlawful purpose, including the unlawful provision of common-carrier railroad operations for which STB authority would be required.

Furthermore, even if the easement does not expressly prohibit the stopping, staging, or storing cars on the line, any such activities that interfere with Allied's operations or access to its property violate the easement. The

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[19] Slip op. at 10 (emphasis added).

[20] Lease dated January 1, 1990 between LTV and MVRY, A-111 (emphasis added).

Board should also note that LTV and Allied, as matters of "Future Cooperation," also agreed "to relocate (or vacate if appropriate) any of the aforegranted easements to facilitate the development of either LTV property or Allied Property, provided any such relocation or vacation will not adversely interfere with either parties' then existing operations or access to their properties."[21] Nothing in the LTV Easement suggests that LTV or its assignee could use the tracks in any fashion that would interfere with Allied's development of its property or conduct unlawful, for-hire rail operations for other entities, that were not authorized by the ICC or the STB, and that are unrelated to LTV's own operations.

By randomly dropping cars on the lines leading to the west side of the Center Street Bridge over Allied's repeated objections, MVRY clearly violated the easement by deliberately interfering with Allied's ongoing operations to redevelop the property that Allied had acquired from LTV in 1992. As John Ramun, Allied's President, owner has testified, prior to Ohio Central's acquisition of MVRY from CVRY, the "old" MVRY did not interfere with Allied's operations, but, consistent with the sole purpose of the easement, cooperated with Allied by moving cars to and from LTV's facility to the west of the Center Street Bridge "without stopping."[22] As Mr. Ramun has testified, once Ohio

[21] Easement Agreement at 5-6.
[22] Allied Opening Statement, Ramun Deposition at 50.

Central became involved, it violated the easement by interfering with Allied's efforts to develop the property by storing cars on all of Allied's track.[23]

Conclusion

In summary, MVRY has never held any authority from the Board or the ICC to operate over Allied's private tracks. Even if MVRY in the past, while operating pursuant to a lease with LTV and an easement granted by Allied, may have used Allied's private tracks to provide service to other than LTV, it did so unlawfully. Moreover, it would have done so without obtaining Allied's approval.

The Board is also asked to note that even though Allied agreed that MVRY would be allowed to provide service to LTV over its tracks, neither LTV nor any other potential shipper remains on Allied's properties. Allied, which owns and operates its own locomotives, intends to use its private tracks solely for its own purposes. It has absolutely no current or future need for MVRY's services.

Finally, as reflected by the lack of any for-hire rail operations over the tracks during the past 5 years, MVRY has other alternative routes available to provide common-carrier service to shippers located in the CASTLO industrial park or at other spots located within the scope of the operating authority granted to it in 1982 by the ICC. Because MVRY does not need to use Allied's

[23] Id. at 46 - 48, 51- 52.

private industrial tracks to perform its lawful common carrier services, no shippers will be impacted if the easement were to be terminated.

For all of the foregoing reasons, the Board should reopen this proceeding and find that ***none of Allied's state law claims against Ohio Central are federally preempted.***

Respectfully submitted,

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Certificate of Service

I hereby certify that on September 30, 2014, a copy of the foregoing Supplemental Comments was served upon the following persons by Email:

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