

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35133

MILWAUKEE INDUSTRIAL TRADE CENTER, LLC, D/B/A MILWAUKEE TERMINAL  
RAILWAY—ACQUISITION AND OPERATION EXEMPTION—LINE OWNED BY  
MILWAUKEE INDUSTRIAL TRADE CENTER, LLC, D/B/A MILWAUKEE TERMINAL  
RAILWAY

Decided: June 11, 2010

This decision revokes an acquisition and operation exemption upon finding that the record raises reasonable and specific concerns that the applicant misused the Board’s class exemption procedures for non-rail purposes.

In this proceeding, the Board has received 2 petitions to revoke the exemption that was obtained by the Milwaukee Industrial Trade Center, LLC, d/b/a Milwaukee Terminal Railway (MITC) to acquire and operate as a rail line approximately 2 miles of private industrial switching track made up of 31 individual spurs<sup>1</sup> within MITC’s 84-acre plant site in Milwaukee, Wis. (Property).<sup>2</sup> The first petition was filed solely by the Redevelopment Authority of the City of Milwaukee (RACM),<sup>3</sup> arguing that MITC was using the authority acquired under our exemption process to: (1) avoid condemnation by RACM of the Property, on which the spurs were located; (2) avoid land use restrictions on the Property; and (3) influence negotiations for the sale of the Property to RACM. The second petition was filed jointly by MITC and RACM (Joint Petition) after they settled their dispute over the Property, seeking to have the Board “undo” the exemption on the ground that MITC did not acquire the spurs to use as a rail carrier and does not intend to operate over them as a rail carrier.

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<sup>1</sup> Of the 31 individual spurs, the longest spur is 0.41 miles, while a third of the spurs are less than 300 feet long. The rail line previously authorized to serve the spurs was owned by Canadian Pacific Railway Company and operated by Wisconsin & Southern Railroad Co. The spurs have not been used in rail service since March 2006.

<sup>2</sup> Notice of the exemption was published in the Federal Register at 73 Fed. Reg. 24,115 on May 1, 2008, and became effective on May 16, 2008.

<sup>3</sup> RACM is an independent and separate agency of the State of Wisconsin with authority to exercise public powers, including the power of eminent domain. See Wis. Stat. § 66.1333(3)(f) (2008).

We will not simply “undo” an exemption because it becomes expedient or convenient for the parties to do so, when, as here, the record does not support such post facto action. To undo such rail authority without considering the entire record could undermine the integrity of the Board’s class exemption process. In their joint petition, the parties seek revocation of MITC’s exemption because, they now argue, MITC did not acquire the spurs as a rail line and had no intention to acquire and operate the spurs as a common carrier. These arguments are inconsistent with the existing record. As discussed below, although we reject the reasoning in the Joint Petition, to protect the integrity of our processes, we will revoke the exemption.

## BACKGROUND

The Property, including the spurs, was part of a 156-acre heavy industrial manufacturing site (Project Area) that went into bankruptcy in 1995. In the aftermath of the bankruptcy, RACM and the City of Milwaukee (City) declared the Project Area legally blighted under Wis. Stat. § 66.1333(2m).<sup>4</sup> RACM then prepared a redevelopment plan for the Project Area which, on December 9, 2005, it recorded against title to the Project Area (including the Property), providing notice to future property owners and making it binding on them. Under the redevelopment plan, certain types of businesses either were not permitted in the Project Area or were permitted only with the approval of RACM.<sup>5</sup>

On November 10, 2006, MITC purchased the Property from its bankrupt owner, including the spurs, for approximately \$2.1 million, subject to the redevelopment plan. Between February 2007 and April 2008, MITC, its affiliates,<sup>6</sup> and its proposed tenants filed applications for occupancy permits on the Property. The City apparently denied or delayed issuance of a number of the requested occupancy permits.<sup>7</sup> Applications that appeared to involve prohibited uses (i.e., scrapping or the processing of construction and demolition waste) were denied. Other applications were only conditionally approved, requiring additional information and RACM’s approval before a permit could be issued.<sup>8</sup>

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<sup>4</sup> RACM’s purposes, under Wis. Stat. § 66.1333(3)(a), include “blight elimination, slum clearance, and urban renewal programs and projects” in the Project Area, where, according to RACM, the most recent census data showed neighborhood unemployment of 19% and housing vacancies of 15%.

<sup>5</sup> Material reclamation facilities, indoor or outdoor salvage operations, and truck-freight terminals are not permitted uses, and recycling-collection facilities and mixed-waste processing facilities are conditional uses, which require RACM’s approval before they may be permitted.

<sup>6</sup> MITC’s affiliates include: Midwest Rail & Dismantling, which is a heavy construction wrecking and demolition contractor; West Milwaukee Recycling, which runs a metal recycling facility and scraps railroad items; and Knapp Railroad Builders (Knapp), which is a heavy construction company that constructs and maintains rail infrastructure and refurbishes rail cars.

<sup>7</sup> See Verified Statement of Benjamin Timm dated Sept. 16, 2008 (Timm V.S.), at 6-7.

<sup>8</sup> Id. at 3, 7.

Just as MITC began filing its occupancy permits, the Milwaukee Economic Development Corporation (MEDC), a corporation that shares space and economic development functions with RACM, offered to buy the Property from MITC for \$1.9 million. MEDC's offer was not accepted, but it led to negotiations between RACM and MITC for the sale of the Property to RACM. In a letter dated January 14, 2008, MITC offered to sell the Property to RACM for \$8.5 million.<sup>9</sup> RACM declined and took the position that, if a negotiated transaction could not be reached, then RACM would condemn the Property under Wis. Stat. § 66.1333(5).<sup>10</sup>

The parties could not reach an agreement, and, shortly after RACM threatened condemnation, MITC filed two legal actions against RACM and the City. On February 5, 2008, MITC filed a petition for writ of mandamus in the Milwaukee County Circuit Court against the City and RACM, asking the court to order the City to issue occupancy permits to MITC, its affiliates, and its proposed tenants. See Milwaukee Indus. Trade Ctr. v. Milwaukee, et al., Case No. 2008-CV-001772 (Cir. Ct., Milw. Cty. filed Feb. 5, 2008) (Mandamus Lawsuit). Less than a week later, MITC also filed a \$32 million inverse condemnation claim against the City and RACM, claiming that RACM was withholding permits to benefit itself in negotiations with MITC over the sale of the Property and that those actions amounted to a taking of the Property by RACM without compensation.

In a letter dated February 29, 2008, RACM informed MITC that it still was willing to purchase a portion of the Property. On March 6 and March 25, 2008, MITC offered to sell the Property to RACM, but the parties again could not reach an agreement. Shortly thereafter, on April 16, 2008, unbeknownst to RACM or the City, MITC filed a notice of exemption to acquire and operate the spurs as a line of railroad. The MITC notice referred to the spurs as a single rail line and stated that the intended uses would be receipt of raw materials for processing or transloading onto trucks, loading of processed materials, and transporting locomotives and railcars for repair, cleaning, and storage.

Unless stayed, a notice of exemption to acquire and operate a line of railroad becomes effective automatically after a certain waiting period. When that happens, the acquiring party can become a carrier and Federal preemption under 49 U.S.C. § 10501(b) applies.

Here, once the exemption became effective on May 16, 2008, MITC rescinded and withdrew all offers to sell the Property to RACM<sup>11</sup> and informed RACM that MITC was now a railroad and that, therefore, RACM was preempted from any attempt to condemn or to enter the

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<sup>9</sup> See RACM's petition to revoke at exhibit A.

<sup>10</sup> See Verified Statement of Rocky Marcoux dated Sept. 16, 2008, at 2-3.

<sup>11</sup> See Timm V.S. at exhibit D (letter dated May 30, 2008).

Property.<sup>12</sup> In response to RACM's motion before the court to issue a special inspection warrant (so that RACM could enter the Property to appraise it and to undertake environmental testing), MITC, in a letter dated June 5, 2008, demanded that RACM withdraw its motion, arguing that the inspection was preempted by section 10501.<sup>13</sup> On June 10, 2008, MITC filed with the court a legal opinion letter dated June 6, 2008, from Thomas McFarland, the attorney who had filed the MITC notice (MITC opinion letter), stating that MITC was a rail carrier and that Federal preemption protected the Property from state regulation.<sup>14</sup> Specifically, the MITC opinion letter stated, among other things, that: (1) "as of [the effective date of the exemption], [MITC] became a rail carrier subject to the jurisdiction of the STB;" (2) "[MITC] has developed specific plans for establishing an intermodal facility to be served by the rail trackage under consideration, for which there is current demand;" (3) "[MITC] has taken reasonable steps to prepare for the commencement of rail operations;" and (4) "[MITC] is able to produce numerous letters from shippers in support of the proposed transloading operation."<sup>15</sup>

After claiming that RACM and the City were preempted from affecting the Property, MITC informed the City of its plans for the Property, including uses not permitted by the City, such as rail delivery of scrap and salvage.<sup>16</sup> Even so, on June 12, 2008, MITC again contacted the City offering to sell a portion of the Property to RACM.<sup>17</sup> On July 8, 2008, RACM informed MITC that RACM might acquire the Property for \$7 million, but MITC responded that the buildings on the Property alone were worth \$15 million in scrap and salvage value.<sup>18</sup> On July 15, 2008, the parties agreed that they were far apart on a purchase price for the Property.<sup>19</sup>

On September 18, 2008, RACM filed its petition to revoke MITC's exemption, arguing that the notice contained false and misleading statements and was a sham device to retain and use the Property for non-rail purposes while using Federal preemption as a shield. On October 6, 2008, MITC replied, arguing that the MITC notice met the technical requirements of the Board's regulations and that "it has taken reasonable steps to implement its rail operating authority."<sup>20</sup> To support its claims, MITC provided the verified statement of MITC general manager Brian Bjodstrup dated October 1, 2008, in which Bjodstrup stated that: (1) the spurs had been used for

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<sup>12</sup> See Verified Statement of Gregg Hagopian dated September 16, 2008 (Hagopian V.S.), at 3.

<sup>13</sup> Id. at exhibit F.

<sup>14</sup> Id. at exhibits G and H.

<sup>15</sup> See Hagopian V.S. at exhibit H.

<sup>16</sup> Id. at 3-4.

<sup>17</sup> Id. at 4.

<sup>18</sup> See Timm V.S. at 9.

<sup>19</sup> Id. at 5.

<sup>20</sup> MITC's reply in opposition to petition to revoke exemption at 17.

delivery of 31 open-top hopper cars purchased by MITC; (2) a locomotive had been placed on the Property; (3) “MITC offers freight rail service to multiple customers as a common carrier;” and (4) MITC had taken several administrative actions, such as applying to the Association of American Railroad for railroad reporting marks and attempting to negotiate an interchange agreement with a connecting rail carrier.<sup>21</sup> However, Mr. Timm, a project manager for RACM, stated that Mr. Bjodstrup described the locomotive to him as a hobby restoration project of the registered agent for MITC’s affiliate Knapp.<sup>22</sup> Mr. Timm also stated that he visited the Property on August 11, 2008, and saw that the locomotive had all of its windows boarded over, and concluded that it had not moved since he has known it to be on the Property.

In a letter filed on November 21, 2008, RACM informed the Board that the parties were engaged in settlement negotiations and requested that the Board suspend the procedural schedule, representing that MITC joined the request. By decision served on December 17, 2008, the Board instituted a proceeding under 49 U.S.C. § 10502(d), and held the proceeding in abeyance to give the parties time to settle the issues raised by RACM in this proceeding. In a letter dated October 7, 2009, the parties informed the Board and the court that they had entered into an agreement for MITC to sell the Property to RACM and for the parties to resolve amicably the litigation between the parties pertaining to the Property. The parties asked that the Board and the court withhold issuing any further decisions until after the real estate closing or until otherwise notified by the parties.

On December 18, 2009, the parties filed the Joint Petition asking the Board to undo the exemption, stating that, on December 15, 2009, the parties had closed on the sale of the Property and that RACM now owns the Property, including the spurs. Notwithstanding MITC’s prior assertions to the contrary, the parties now argue that MITC never exercised its exemption authority because it did not acquire the spurs as common carrier track and had no intent to acquire and operate the spurs as a common carrier track. In support, the parties attach an affidavit of MITC’s counsel, Mr. McFarland—the same counsel who wrote the MITC opinion letter—stating that he has “direct knowledge that MITC has not exercised the authority provided by that exemption.”<sup>23</sup> As a bottom line, the parties ask the Board to “undo this unexercised and unwanted exemption.”<sup>24</sup> As discussed below, we will revoke the exemption, but not for the reasons argued in the Joint Petition.<sup>25</sup>

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<sup>21</sup> See Bjodstrup V.S. at 1-2.

<sup>22</sup> See Timm V.S. at 8.

<sup>23</sup> See Joint Petition, Affidavit of Thomas F. McFarland, at 1.

<sup>24</sup> See Joint Petition at 5.

<sup>25</sup> On October 16, 2008, RACM filed a petition for leave to reply to MITC’s reply to its initial petition to revoke. On March 10, 2010, RACM, as owner of the Property, filed a petition for expedited consideration of the Joint Petition. As we are issuing a decision revoking the exemption, these petitions are either immaterial or moot.

## DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10901, a noncarrier such as MITC may acquire and operate a rail line only if the Board finds that the proposal is not inconsistent with the “public convenience and necessity.” But under certain “class exemptions,” such as that found at 49 C.F.R. § 1150.31, which MITC has invoked here, a noncarrier can obtain authority to acquire and operate a line of railroad, subject to that authority being later revoked (if our regulatory scrutiny is found to be necessary). Under 49 U.S.C. § 10502(d), we may revoke an exemption as applied to a particular transaction if we find that regulation of the transaction at issue under the otherwise applicable statutory provisions (here, § 10901) is necessary to carry out the rail transportation policy of 49 U.S.C. § 10101. Here, the record raises several reasonable and specific concerns about MITC’s use of our class exemption procedures for purposes unrelated to the provision of rail service. At a minimum, greater regulatory scrutiny would be necessary for MITC to seek Board approval to acquire and operate the spurs as a rail line, as discussed below.

In the Joint Petition, the parties contend that MITC never exercised its exemption authority to acquire and operate the spurs as a rail line. We agree that MITC never exercised its exemption authority, but not for the reasons suggested by the parties. Instead, the record supports a conclusion that MITC did not exercise its exemption authority because MITC was using the exemption for non-rail purposes. Rather than supporting the parties’ request that we “undo” the exemption, the parties’ statements in the Joint Petition appear to support RACM’s initial petition to revoke, in which RACM provided specific and reasonable evidence that the exemption was a sham and that MITC never intended to become a rail carrier in the first place.

In its initial petition to revoke, RACM alleged that MITC’s filing of the MITC notice was merely a tactic to aid MITC in its negotiations with RACM for the sale of the Property, to stave off RACM’s threatened condemnation of the Property, and to obtain permits from the City for uses that are not permitted on the Property under the redevelopment plan. RACM submitted specific evidence of MITC’s ongoing efforts to sell the Property to it for escalating prices and contended that these negotiations showed that MITC was using the Board’s exemption procedures as leverage. In January 2008, MITC offered to sell the Property to RACM for \$8.5 million; RACM rejected the offer and threatened to take the Property using its condemnation authority. In June 2008, after using the class exemption to obtain authority to operate over the spurs, MITC told RACM that the Property now was worth more than \$15 million. The only significant change that the record shows between January and June was that MITC’s exemption authority became effective on May 15, 2008.

The timing and nature of MITC’s offers to sell the Property to RACM raise serious concerns that MITC was misusing the Board’s class exemption process to drive the price for the Property higher rather than to provide rail service. We are similarly troubled by evidence in the record that MITC intended to use its exemption authority to circumvent the local occupancy permitting process and its title restrictions for purposes other than providing rail transportation. In the Mandamus Lawsuit, MITC sought to compel RACM and the City to issue permits to its

affiliates for business uses not appropriate under the terms of the redevelopment plan. After receiving exemption authority, MITC stated that RACM and the City were preempted from regulating any part of the Property and indicated that it intended to use the Property for business uses for which it had not received permits. Additionally, shortly after the negotiations broke down in January 2008 and RACM threatened to condemn the Property, MITC filed the inverse condemnation claim against RACM. Before the court, RACM sought to inspect the Property to test and appraise it for purchase or condemnation purposes. MITC opposed the inspection request. After receiving its exemption authority, MITC claimed that RACM was preempted from inspecting or condemning the Property. While seeking Federal preemption is an appropriate action to protect transportation by rail carrier from state or local interference, the record raises concerns that MITC was using the Board's exemption authority for non-rail purposes.

In response to RACM's allegations that the exemption was a sham, MITC originally asserted that it had taken certain steps to become a rail carrier,<sup>26</sup> listing several actions that MITC has taken, and used the MITC opinion letter to the effect that it had done enough to become a rail carrier. However, we do not believe MITC's actions sufficiently demonstrated a good faith effort toward implementing its exemption authority given the facts of this case. Specifically, MITC stated that it had purchased 31 open-top hopper railcars. But MITC did not indicate whether it intended to use any of the open-top hopper cars as part of its rail operations to serve the spurs. On this record, it appears equally likely that those railcars were to be refurbished by MITC's affiliate, Knapp, which is in the business of refurbishing railcars. MITC also submitted that a locomotive was located on the property; but the record suggests that it was inoperable and was purchased and held for reasons other than rail operations. The other rail-related actions listed in Mr. Bjodstrup's verified statement are administrative actions that are not specifically related to operating a rail carrier.

This case is closely analogous to the Board's precedent in Jefferson Terminal Railroad—Acquisition & Operation Exemption—Crown Enterprises, 5 S.T.B. 461 (2001) (Jefferson Terminal). In that case, the Board revoked an exemption to acquire and operate long unused industrial tracks as a line of railroad, finding that the timing of the notice and the acquirer's failure to inform the Board of an ongoing condemnation proceeding suggested an effort to use the exemption process to insulate the property from state and local authority by invoking the Board's jurisdiction. The Board declined to allow its processes to be misused in that manner and stated that any further proceedings would be handled under a more searching process—either through a petition for an individual exemption under 49 C.F.R. § 1121 or a full application under 49 C.F.R. § 1150—designed to elicit a more complete record. Although RACM had not begun a condemnation proceeding before MITC filed its notice, other facts raise additional concerns here

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<sup>26</sup> See Bjodstrup V.S. at 1-2.

that were not present in Jefferson Terminal, such as the escalating purchase offers and apparent attempt to bypass local permitting and inspection laws.<sup>27</sup>

Despite the existing record in this proceeding, MITC appears willing to change its arguments and contradict its previous testimony and evidence because it now desires to transfer the Property without a common carrier obligation. While we generally encourage, and even assist, private dispute settlement, we will not do so here, where the record raises specific and reasonable concerns that MITC abused our process to negotiate a higher price for the Property from RACM and did not pursue the exemption in good faith. We cannot ignore evidence that raises significant doubts about whether MITC ever intended to initiate rail service. MITC held the property for over 3 years and appears never to have held itself out as a common carrier. Further, the record shows a number of inconsistencies between MITC's actions and its use of the Board's class exemption procedures, including the parties' post hoc reasoning in the Joint Petition. As in Jefferson Terminal, the specific evidence in the record presents reasonable and specific concerns that MITC was using the Board's class exemption process for non-rail purposes. Therefore, we will revoke the exemption to protect the integrity of our process. See Land Conservancy of Seattle and King County—Acquis. & Operation—Burlington N. & Santa Fe Ry., 2 S.T.B. 673, 677 (1997).

We recognize the irony of the situation here, where the party that may be abusing the Board's class exemption process ultimately gets what it wants. But it does so here at the expense of its own credibility and the credibility of those who made filings and statements on its behalf. Ultimately, the means by which we protect the integrity of our class exemption process is by revoking the exemption for the reasons set forth above.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The exemption is revoked, for the reasons discussed in this decision, and this proceeding is discontinued.
2. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.

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<sup>27</sup> See also Riverview Trenton R.R.—Acquis. & Operation Exemption—Crown Enter. FD 33980 (STB served Feb. 15, 2002) (revoking a class exemption, finding that the transaction attracted substantial controversy and opposition, and concluding that the substantial factual and legal issues presented required additional scrutiny and development of a more complete record).