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SERVICE DATE - LATE RELEASE OCTOBER 20, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34462

MVC TRANSPORTATION, LLC—ACQUISITION EXEMPTION—  
P&LE PROPERTIES, INC.

STB Finance Docket No. 34462 (Sub-No. 1)

MVC TRANSPORTATION, LLC—PETITION FOR DECLARATORY ORDER

Decided: October 20, 2004

On June 4, 2004, MVC Transportation, LLC (MVC) filed a petition seeking a declaratory order finding: (1) that claims filed by Proline Railroad Track Co. (Proline) in the Common Pleas Court of Allegheny County, PA (Pennsylvania court), challenging MVC's acquisition of the McKees Rocks Yard (Yard) constitute a collateral attack on the Board's authorization of the acquisition, and (2) that the Pennsylvania court is without jurisdiction to render the relief sought by Proline. On June 24, 2004, Proline replied and filed a petition asking the Board to revoke the exemption that permitted MVC to acquire the Yard. For the reasons discussed below, we will deny both MVC's and Proline's petitions.

BACKGROUND

This case involves an ongoing dispute between two companies, MVC and Proline, both of which claim rights to track in the McKees Rocks Yard. MVC has asked the Board to resolve ownership issues arising from this dispute, while Proline has asked a Pennsylvania court to do so. The ownership issues depend in part on the type of track that is the subject of the dispute. A determination of whether track is track subject to the Board's licensing authority under section 49

U.S.C. 10901, or is excepted track under section 49 U.S.C. 10906,<sup>1</sup> is clearly within the Board's expertise. The relevant facts are as follows.

### Claims to the Property

During 1991 and 1992, the Pittsburgh and Lake Erie Railroad Company (PLERC) sold substantially all of its rail lines. See CSX Transp., Inc.–Acq. & Lease Exemp.–Pittsburgh & Lake Erie R. Co., Finance Docket No. 31827 (ICC served June 28, 1991); see also Three Rivers Ry. Co.–Acq. & Oper. Exemp.–Pittsburgh & Lake Erie R. Co., Finance Docket No. 32055 (ICC served Sept. 29, 1992). Although CSX Transportation, Inc. (CSXT) acquired the main line running through the Yard, PLERC did not sell the Yard itself. In 1993, PLERC changed its name to Pittsburgh & Lake Erie Properties, Inc. (P&LE) to reflect that it no longer provided rail service. P&LE declared bankruptcy in 1996.

In April 1997, with bankruptcy court approval, P&LE sold the Yard, including the track and real property, to Allegheny Railroad Properties, Inc. (ARP), and accepted a cognovit judgment note and mortgage from ARP as security. MVC claims, however, that the sale did not close.

Shortly thereafter, ARP sold the track materials, rail, switches, and ties (track or track assets) in the Yard to Kovalchick Corporation (Kovalchick), a rail salvage company. In April 1998, Kovalchick sold the track to Proline Services, Inc., which then assigned its right to the track to Proline.<sup>2</sup> MVC states that ARP and the subsequent purchasers bought the track only with the intent to salvage it.

In 1999, ARP defaulted on its payment obligations to P&LE. That same year, the ARP note and mortgage were acquired by Mariah Venture Capital & Consulting, Co. (Mariah) with

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<sup>1</sup> Section 10906 provides:

Notwithstanding section 10901 and subchapter II of chapter 113 of this title, and without the approval of the Board, a rail carrier providing transportation subject to the jurisdiction of the Board under this part may enter into arrangements for the joint ownership or joint use of spur, industrial, team, and switching, or side tracks. The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.

<sup>2</sup> Proline claims to own approximately 10.5 miles of track. According to MVC, an additional approximately 5 miles of track was sold to A&K Railroad Materials, Inc. MVC and Proline disagree as to whether the assets were sold by Proline or Kovalchick.

the consent of a bankruptcy court. The heart of the current dispute between MVC and Proline centers on the legal effect, if any, of the default on the ownership of the track assets at issue.

### Pennsylvania's State Court Proceeding

On December 16, 2003, Proline initiated an action in the Pennsylvania court alleging that under Pennsylvania state law Mariah had engaged in conversion and tortious interference with a contract between Proline and AllenRailroad.com to inventory and sell the track. In the alternative, Proline sought a declaration regarding ownership of the track. Mariah moved to dismiss the case on grounds that jurisdiction over this matter lies with the Board, but the Pennsylvania court rejected Mariah's motion.

### The Exemption Proceeding

On April 8, 2004, while this property dispute was pending, MVC filed a notice of exemption under 49 CFR 1150.31 to acquire from P&LE approximately 15 miles of rail lines, which MVC claims include the Yard track. The exemption became effective on April 15, 2004, and notice of it was served and published in the Federal Register on April 29 at 69 FR 23557. MVC claims that, once the exemption became effective, Mariah assigned the ARP note and mortgage to MVC, which in lieu of execution and foreclosure, took title to the Yard, including the track assets, by deed and bill of sale from P&LE.

### Proceedings Currently Before the Board

On June 4, 2004, MVC filed the instant petition asking the Board for a declaratory order. As explained below, MVC argues that Proline could not own the Yard track because none of the parties in the chain of ownership between P&LE and Proline complied with the Board's acquisition or abandonment regulations. MVC further contends that Proline's ownership claim undermines the acquisition authority that the Board granted to MVC pursuant to the notice of exemption. Therefore, MVC asks the Board to declare that Proline's claim challenging MVC's acquisition is an impermissible collateral attack and that the Pennsylvania court is without jurisdiction to render Proline's sought relief.

On June 24, 2004, Proline replied and filed a petition asking the Board to revoke the exemption that permitted MVC to acquire the Yard. Proline disputes MVC's ownership claims regarding the track assets and argues, among other things, that MVC is misusing the Board's exemption procedures to avoid a determination on the merits by the Pennsylvania court that rejected Mariah's preliminary objections to the court's jurisdiction. On July 27, MVC filed its reply and asked the Board to consolidate the proceeding involving MVC's petition for a declaratory order with the proceeding involving Proline's petition to revoke the exemption.

In a letter filed on August 26, MVC asked the Board not to render a decision in this case until CSXT could file information on CSXT's interest in the Yard. CSXT submitted a letter on September 2, 2004, in which it takes no position in these proceedings but describes its rail operations in the vicinity of the Yard. CSXT states that it owns and operates a double-track main line through the Yard facilities, as well as three classification tracks, which are parallel to, and adjacent to, its main-line tracks and which are within its right-of-way. CSXT also explains the limited nature of its operations in the vicinity of the Yard.

In a letter also filed on September 2, 2004, Proline states that it is eager to work with CSXT regarding any plans CSXT may have to utilize the Yard. However, Proline argues that we should not consider CSXT's submission because this matter involves a state law ownership dispute and CSXT's interests cannot affect the legal arguments before us here. Proline asks that, if we do consider CSXT's submission, we allow it to file a reply. By letter filed on September 9, MVC asks that we disregard Proline's September 2 letter because it is a "reply to a reply," and thus not permitted under the Board's regulations.

#### PRELIMINARY MATTERS

We will grant MVC's request to consolidate these proceedings, which share the same parties and many of the same facts and issues. Consolidation will not delay either proceeding or cause prejudice to any of the parties.

We will consider CSXT's submission, which provides us with a better understanding of operations in the Yard. Also, in the interest of a complete record, we will accept Proline's September 2 letter.

On October 19, 2004, Proline has filed what amounts to a reply to CSXT's submission on September 2. This filing, a verified statement from Eric Close, President of Proline, seeks to correct the "inaccurate" description of CSXT operations provided by CSXT to the Board in its September 2 filing. We will not consider Proline's submission. Proline has submitted its filing more than 40 days after CSXT filed its letter and within hours of an October 20 public voting conference scheduled in part to resolve these cases. Proline has not attempted to justify its tardiness. Parties are advised that 11th-hour filings like this one are discouraged.

#### DISCUSSION AND CONCLUSIONS

##### DECLARATORY ORDER

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, the Board has discretion to issue a declaratory order to terminate a controversy or remove uncertainty. For the reasons discussed below, MVC's petition for a declaratory order will be denied.

The heart of this proceeding is an ongoing legal dispute between MVC and Proline over the ownership of certain rail track assets located in the Yard. Proline brought its ownership claim before a Pennsylvania court. MVC filed the instant petition in hopes that the Board would resolve the dispute.

MVC claims that Proline cannot lawfully own the Yard track because it never sought STB approval of its alleged acquisition and the Yard track was never abandoned. According to MVC, because some of the track is not stub-ended and the track in the Yard connects shippers with a CSXT main line and various other rail carriers, the track in the Yard is subject to Board jurisdiction under section 10901 and not excepted under section 10906. Because P&LE never received abandonment authority and neither ARP nor any of the other parties in Proline's chain of ownership obtained Board acquisition authority, MVC argues, Proline could not have lawfully acquired the Yard track.

We reject this argument because we believe that the track in the Yard was excepted track when used by PLERC. Yard track is typically considered to be excepted, see Nicholson v. I.C.C., 711 F.2d 364 (D.C. Cir. 1983), and here no one disputes that the track, most of which was stub-ended, was wholly within PLERC's Yard. As noted by Proline, PLERC performed switching, maintenance, warehousing, and refueling activities in the Yard. MVC does not dispute that the track assets were used for these auxiliary purposes, rather than to extend PLERC's rail service into new territory. The fact that some of the track may have eventually connected to rail lines or could be used to move traffic into interstate commerce does not change our finding. Almost all track excepted under section 10906 eventually connects by some means with track carrying line-haul movements in interstate commerce. Because the track was excepted, there was no need for ARP or any of the subsequent purchasers to obtain Board authority prior to acquiring the track for purposes of salvage or for P&LE to obtain abandonment authority prior to disposing of the track for salvage. The track in question ceased being part of the national rail transportation system years ago when it was sold to ARP and Kovalchick for salvage.

MVC also argues that, because several shippers in or adjacent to the Yard presently receive common carriage service from CSXT, the track could not have been abandoned and sold under section 10906. In particular, MVC points to a verified statement alleging that CSXT currently provides service to five shippers in or adjacent to the Yard. MVC's reply includes a verified statement from one of these shippers, McKees Rocks Depot, located adjacent to the Yard, alleging that the shipper will lose access to CSXT service if the Yard track is salvaged.

MVC's claims that CSXT provides service over the subject track and McKees Rocks Depot's concerns about access are inconsistent with CSXT's own description of its operations in the Yard. According to CSXT, because shippers place their cars in CSXT's right-of-way, CSXT does not provide service over the track in the Yard. CSXT further states that, although it could provide service upon request, it would first be necessary to negotiate industrial sidetrack

agreements with the shippers, as CSXT neither owns nor has the right to use the track. In any event, none of the descriptions of current operations in the Yard undercuts our finding that the track has historically been excepted section 10906 track that could have been sold for salvage in 1997 without Board authority.

MVC also argues that Proline's ownership claim undermines the authority the Board granted to MVC through MVC's notice of exemption. It is a longstanding principle that the Board's grant of a notice of exemption to acquire gives the applicant permission to acquire, but does not mandate such. Thus, the authority the Board granted to MVC was permissive, not mandatory, and MVC's acquisition exemption could not confer on MVC any ownership rights to the Yard track assets it did not possess under Pennsylvania law. The Board's authorization cannot be viewed as conveying property rights to MVC or as a declaration by the Board that MVC actually owns particular assets within the Yard.

Under these circumstances, we find it proper for the Pennsylvania court to resolve the dispute over ownership of the Yard track assets. The questions here involve local property law, contract law, and mortgages, which are for a court to answer, not the Board. As discussed above, the Board's publication of the notice of exemption has not given MVC an ownership interest in the track assets superior to what it already might have had under Pennsylvania state law, under the circumstances presented here. As a result, MVC's petition for a declaratory order will be denied.

The record shows that CSXT has expressed interest in purchasing the rail facilities in the Yard from MVC. CSXT is considering relocating its Pittsburgh yard facilities currently in the Glenwood Yard to McKees Rocks so that the Glenwood Yard can be made available for a regional construction project. In our view, our decision here would not undermine CSXT's opportunity to do so. Indeed, in its letter filed September 2, 2004, CSXT states that it takes no position with respect to the issues involved in the dispute between MVC and Proline, and in a letter also filed on that date, Proline states that it is eager to work with CSXT regarding any plans that the railroad may have to utilize the Yard.

#### REVOCAION OF THE EXEMPTION

The fact that the track was excepted when it was used by PLERC does not mean that it could not be used as main line track by a new operator (such as MVC) for whom it would be a new or extended line of railroad. See Effingham RR Co.–Pet. For Declaratory Order, 2 S.T.B. 606 (1997), reconsideration denied, Effingham Railroad Company–Petition for Declaratory Order–Construction at Effingham, IL, et al., STB Docket No. 41986, et al. (STB served Sept. 18, 1998), aff'd sub nom. United Transp. Union v. STB, 183 F.3d 606 (7th Cir. 1999). Thus, the prior status of the track did not constitute a bar to MVC's obtaining rail acquisition authority. Proline nevertheless asks us to revoke MVC's exemption.

Under 49 U.S.C. 10502(d), we may revoke an exemption if we find that regulation of the transaction at issue is necessary to carry out the rail transportation policy of 49 U.S.C. 10101. The party seeking revocation has the burden of proof and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and regulation of the transaction is necessary. And the exemption is void ab initio if it contains false or misleading information. See Bulkmatic Railroad Corporation-Acquisition Exemption-Bulkmatic Transport Company, et al., STB Finance Docket No. 34145, et al. (STB served Nov. 19, 2002).

In support of its petition to revoke, Proline has attempted to show that MVC misled the Board by indicating that it was purchasing the track assets from P&LE. Proline claims that P&LE lost title when it sold the Yard to ARP and that Mariah's mortgage was extinguished long ago. Consequently, according to Proline, MVC could not have received the property interests it claims to have received from P&LE or Mariah.

However, we do not find that the information contained in MVC's notice constituted false or misleading information or otherwise warrants our revoking or voiding the exemption. When MVC filed its notice of exemption, it merely explained its belief that it lawfully could acquire the facilities even though another party claimed ownership. MVC has reiterated its claim in its instant petition. As discussed above, the ownership of the track assets is properly before a Pennsylvania court for determination. If MVC prevails, it may exercise the authority to become a rail carrier over the disputed track pursuant to the notice of exemption. If Proline prevails, it will have the right to sell the track to whomever it wishes. Indeed, at that point MVC could negotiate with the lawful owners to acquire the track or could replace any track removed by the lawful owner. In any event, in these circumstances, we fail to see why regulation by this agency of MVC's proposed transaction is necessary to carry out the national rail transportation policy. We therefore decline to revoke the exemption.

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

It is ordered:

1. STB Finance Docket No. 34462 and STB Finance Docket No. 34462 (Sub-No. 1) are consolidated.
2. The letters of CSXT and Proline are accepted.
3. Proline's October 19 submission is not accepted.
4. MVC's petition for a declaratory order is denied.

5. Proline's petition to revoke the exemption is denied.

6. This decision is effective on its date of service.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams  
Secretary