



KAPLAN KIRSCH ROCKWELL

April 8, 2013

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

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ENTERED
Office of Proceedings
April 8, 2013
Part of
Public Record

Re: *MCM Rail Services LLC D/B/A Baltimore Industrial Railroad – Operation
Exemption – HRE Sparrows Point, LLC*, STB Finance Docket No. 35725

*MCM Rail Services LLC – Petition for Retroactive Exemption – in Sparrows
Point, MD*, STB Finance Docket No. 35707

Dear Ms. Brown:

I have attached the Petition of the Maryland Department of Transportation for Leave to Intervene in the above-referenced proceedings.

Sincerely,

Charles A. Spitulnik

Attachment

496829

**Before the
Surface Transportation Board
Washington, D.C.**

STB Finance Docket No. 35725

**MCM RAIL SERVICES LLC D/B/A BALTIMORE INDUSTRIAL RAILROAD –
OPERATION EXEMPTION – HRE SPARROWS POINT, LLC**

STB Finance Docket No. 35707

**MCM RAIL SERVICES LLC – PETITION FOR RETROACTIVE EXEMPTION – IN
SPARROWS POINT, MD**

**PETITION OF
THE MARYLAND DEPARTMENT OF TRANSPORTATION
FOR LEAVE TO INTERVENE**

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Dated: April 8, 2013

**Before the
Surface Transportation Board
Washington, D.C.**

STB Finance Docket No. 35725

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**PETITION OF
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FOR LEAVE TO INTERVENE**

The Maryland Department of Transportation (“**MDOT**”) hereby petitions this Board pursuant to 49 C.F.R. § 1117.1 for leave to intervene in the above referenced proceedings in order to protect an important component of the State of Maryland’s rail and intermodal transportation infrastructure.¹ Based on the filings made by MCM Rail Services LLC (“**MCM**”) in the above mentioned proceedings, MDOT has serious concerns regarding whether MCM’s proposed operations are consistent with the rail transportation policy of 49 U.S.C. § 10101 and whether the expedited processes available under 49 U.S.C. § 10502 and 49 C.F.R. § 1150.31 are appropriate under these circumstances. MDOT has a strong interest in preserving rail infrastructure in the State, particularly at locations where a rail line provides service to shippers and to facilities that make a substantial contribution to the vibrancy of the State’s economy.

¹ While MDOT is filing this Petition for Leave to Intervene pursuant to 49 C.F.R. § 1117.1, the Petition follows the standards articulated in 49 C.F.R. § 1112.4 for petitions for leave to intervene in modified procedures.

MDOT opposes any outcome that would reduce, rather than protect or enhance, current and future rail service along the line subject to these proceedings, and as a result, believes that the Board should continue to hold these proceedings in abeyance until MCM provides further information about its proposed operations.

BACKGROUND

On December 20, 2012, MCM, a noncarrier, filed a Petition for Retroactive Exemption (the “**Petition**”) requesting Board authority to operate as a common carrier over approximately 12 miles of railroad line in Sparrows Point, Baltimore County, Md. (the “**Line**”). MCM Rail Services LLC, Petition for Retroactive Exemption, STB Finance Docket No. 35707 (Filed Dec. 20, 2013). According to the Petition, Environmental Liability Transfer, Inc., Commercial Development Company, Inc., and Sparrows Point, LLC (“**SP**”) purchased the Line and other real property and assets of a bankrupt steel mill (collectively, the “**Property**”) in Sparrows Point through bankruptcy proceedings. *Id.* at 3. As part of the purchase, SP granted HRE Sparrows Point, LLC (“**HRE**”) “certain assets” on the Property as well as a “license to exclusively operate” the Line for a forty-two month period as of August 7, 2012. *Id.* at 3. HRE’s intent in acquiring these assets was to “market, sell or demolish, remove and scrap certain property, plant, equipment and improvements at the Sparrows Point property.” *Id.* at 2. HRE engaged MCM Management, Inc. (“**MCM Management**”), the parent corporation of MCM, to demolish and scrap the Property. *Id.* at 3-4. The Petition stated that MCM had been operating the Line on behalf of HRE since September 14, 2012, and that HRE and MCM were in the process of negotiating an operating agreement to operate over the Line. *Id.* at 4. According to the Petition, MCM was not aware at the time it assumed control of railroad operations on the Line that the Line was “a common carrier line subject to the jurisdiction of the Board.” *Id.* at 5.

On March 20, 2013, the Board served a decision (the “**March 20th Decision**”) in which it initiated an exemption proceeding and requested additional information from MCM regarding the ownership, transactional history, and regulatory status of the Line. *MCM rail Service LLC – Petition for Retroactive Exemption – In Sparrows Point, Md.*, STB Finance Docket No. 35707 (Service Date March 20, 2013). The same day the Board issued the March 20th Decision, MCM filed a notice of exemption (the “**Notice**”) in a separate proceeding seeking the same operating authority that it had previously sought in the Petition. MCM, Verified Notice of Exemption, STB Finance Docket No. 35725 (Filed Mar. 20, 2013). In the Notice MCM identified HRE as the party transferring the property to MCM. *Id.* at 5. The Notice also stated that MCM would withdraw the Petition. *Id.* at 3. The Board subsequently served a second decision on April 5, 2013 (the “**April 5th Decision**”) addressing both the Petition and the Notice. *MCM Rail Services LLC d/b/a Baltimore Industrial railroad – Operation Exemption – HRE Sparrows Point, LLC*, STB Finance Docket No. 35725, and *MCM Rail Services LLC –Petition for Retroactive Exemption – In Sparrows Point, MD*, STB Finance Docket No. 35707 (Service Date April 5, 2013). The April 5th Decision accepted MCM’s Notice in Finance Docket No. 35725, but held its publication and effectiveness in abeyance pending either a request for Board authority from HRE as the Line’s owner, or alternatively an explanation from MCM as to why HRE did not require such Board authorization. *Id.* slip op. at 2. In addition, the April 5th Decision directed MCM to withdraw either the Petition or the Notice, or otherwise explain why both are necessary. *Id.* slip op at 3.

MDOT’S INTEREST IN THESE PROCEEDINGS

MDOT is the state agency responsible for overseeing all aspects of transportation within the State of Maryland. MDOT’s duties include protecting the interests of the State and its

residents and businesses with respect to the use of the State's transportation infrastructure, as well as providing statewide transportation policy and planning. Facilitating the safe and efficient movement of people and goods is MDOT's core mission.

A critical component of Maryland's transportation system is its railroad and intermodal infrastructure located in and around the Port of Baltimore. In 2012, the Port of Baltimore's public and private marine terminals handled a combined 36.7 million tons of cargo at a value of \$53.9 billion, leading it to be ranked 11th in terms of foreign tonnage and 9th in terms of dollar value nationally. Maryland Port Administration, *2012 Foreign Commerce Statistical Report – Port of Baltimore*. Freight railroad operations serving the Port of Baltimore, including Sparrows Point, play a vital role in facilitating Baltimore's and Maryland's economic activity. MDOT coordinates and partners with railroads in and around the Port of Baltimore to ensure that the surrounding railroad infrastructure remains intact and able to serve area businesses.

The Property and the rest of Sparrows Point occupy an advantageous location, and its position is enhanced by active rail service connecting Sparrows Point businesses to the national rail network. That rail service, along with connections to the water and the interstate highway network, allows Sparrows Point to function as a true intermodal transportation hub. As the Petition noted, approximately a dozen businesses in Sparrows Point are currently served by the Line. Petition at 5, n.1. Accordingly, MDOT is keenly interested in ensuring that the Line remains in active operation in order to maintain service to these businesses and keep open the possibility of further opportunities for developing economic activity.

THE BOARD DOES NOT PERMIT USE OF ITS EXEMPTION PROCESS FOR DECONSTRUCTION AND SALVAGING OF LINES

Pursuant to its authority under 49 U.S.C. § 10502, the Board must exempt a noncarrier's acquisition of a rail line if the Board finds that (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101, and (2) either (a) the transaction or service is limited in scope, or (b) regulation is not needed to protect shippers from abuse of market power. The purpose of the exemption is to facilitate the operation of lines by expediting and reducing the costs of entry into the rail industry. *S&F Ry. – Acquisition and Operation Exemption – Toledo, Peoria and Western Ry. Corp. between La Harpe and Peoria, Il.*, STB Finance Docket No. 33995 and *Kern W. Schumacher and Morris H. Kulmer – Continuance in Control Exemption – SF&L Ry.*, STB Finance Docket No. 33996 (Service Date Oct. 17 2002) (“*S&F Railway*”). However, the Board has made clear that it “will not allow our class exemption processes to be abused by sales of active rail lines to persons whose intent is to degrade, abandon, and salvage those lines.” *Id.* slip op. at 19.

In *S&F Railway*, the Board revoked a notice of exemption under 49 C.F.R. § 1150.31 for acquisition of a rail line and ordered the acquirer to reconvey the operating easement over the line to the seller. *Id.* The Board did so based on evidence that the acquirer's intent was to deconstruct and salvage the line rather than continue operating it. *Id.* Among the factors that supported the Board's decision were (1) the acquirer's decision not to purchase enough of the line to procure interchange traffic from a connecting railroad; (2) the hasty purchase of the line with no analysis other than an assessment of the salvage value of the track; (3) the failure of the acquirers to acquire essential components of the line; (4) the anticipation of abandonment and understanding that the seller would support the future abandonment of the line; (5) the

unstructured financing; and (6) the unexplained delay in consummating the transaction and related confusion that resulted. *Id.* While the Board acknowledged that abandonment and salvaging of lines acquired under the exemption process would inevitably occur in some circumstances, it distinguished those cases from cases where a party deliberately sought to acquire the line for the purposes of abandonment. *Id.* slip op. at 17. In a subsequent decision, the Board noted the various aspects of the national rail policy, provided at 49 U.S.C. §10101, that supported revocation, including 49 U.S.C. 10101(4) ensuring the development and maintenance of a sound rail system; (5) fostering sound economic conditions in transportation; and (9) encouraging honest and efficient management of rail carriers. *S&F Ry. – Acquisition and Operation Exemption – Toledo, Peoria and Western Ry. between La Harpe and Peoria, Il.*, STB Finance Docket No. 33995, *Kern W. Schumacher and Morris H. Kulmer – Continuance in Control Exemption – SF&L Ry.*, STB Finance Docket No. 33996, and *SF&L Ry. – Abandonment Exemption – In Hancock, McDonough, Fulton and Peoria Counties, IL.*, STB Docket No. AB-448 (Sub-No. 2X, slip op. at 3 (Service Date Jan. 31, 2003) (“*S&F Railway II*”).

With respect to the transaction(s) that are the subject of the instant proceedings, MDOT has the same serious concerns regarding MCM’s and HRE’s intent to maintain operation of the Line in light of the information provided in both the Petition and the Notice that is similar to facts that caused the Board to revoke the Notice of Exemption in the proceedings related to S&F Railway. As noted above, the Petition contains statements indicating that the purpose of obtaining an operating exemption is to demolish and scrap the Property. The Petition indicates that HRE acquired a “license to exclusively operate” the Line for a forty-two month period, during which it planned to contract with MCM Management to “market, sell or demolish, remove and scrap certain property, plant, equipment and improvements at the Sparrows Point

property.” Petition at 2-4. MCM was not aware at the time that it acquired operating control over Line that the Line was subject to the Board’s jurisdiction. *Id.* at 5. MCM Management, MCM’s parent company, is “primarily in the business of demolition and construction and demolition debris recycling and disposal.” *Id.* The Notice states that HRE and MCM have entered into a Railroad Services Agreement to operate the Line until March 14, 2016. Notice at 4. The Notice also provides that “*unless* the Agreement is extended or MCM is otherwise able to continue to provide rail service over the Line, MCM *shall seek discontinuance authority from the Board prior to discontinuing service over the Line.*” *Id.* (emphasis added).

Connecting the dots, MDOT believes there is a distinct possibility that MCM and HRE intend to demolish and salvage the Line along with the rest of the Property acquired by HRE and discontinue service at the end of the three and a half year operating agreement. To the extent that details regarding the proposed operation are available, they reflect many of the factors considered by the Board in *S&F Railway*. HRE’s primary motivation in acquiring the Line and the Property appears to be for its salvage value. MCM and, possibly, HRE, did not even realize it was part of the national rail network and therefore subject to the Board’s jurisdiction. HRE has not yet made any filings with the Board seeking acquisition of the Line or residual common carrier rights. Meanwhile, the parent corporation of the supposed operator, MCM Management, is in the demolition business, and has been hired specifically to demolish and scrap the Property. The relatively short duration of the operating agreement, after which the cessation of operation of the Line appears to be a foregone conclusion, further suggests that neither MCM nor HRE are interested in maintaining rail service over the Line beyond the length of time it will take to demolish and scrap the Property. Finally, the inconsistent nature of Board filings by MCM in the

two subject proceedings suggests that operation of the Line for common carrier service is not MCM's intent.

As a result, MDOT supports the Board's stay of the Proceedings and concurs that further information regarding MCM's and HRE's intent is warranted at this time. Much of what is known about this transaction so far suggests that the Board's exemption authority is not applicable here because the transaction is inconsistent with the national rail transportation policy contained at 49 U.S.C. § 10101. In particular, as in *S&F Railway*, the proposed transaction will not ensure the development and maintenance of a sound rail system, foster sound economic conditions in transportation, or encourage honest and efficient management of rail carriers. 49 U.S.C. § 10101(4), (5), (9); *S&F Railway II*, slip op. at 3. MCM's filing of the Notice has served to further muddle, rather than clarify, the information that is before the Board, and the current record suggests that MCM's and HRE's intent is not to preserve the assets to foster continued rail service at this location.

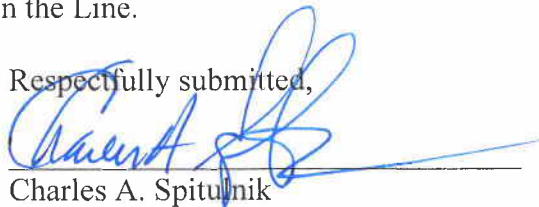
While MDOT recognizes that the Board typically provides regulatory review of an acquisition exemption through the revocation process, MDOT nevertheless believes that under these circumstances further investigation before giving effect to the exemption is warranted. In particular, the Board may conduct a review of an exempt transaction before that transaction is consummated if it determines that to not do so would produce irreparable harm. *See Iowa, Chicago & Eastern R.R. – Acquisition and Operation Exemption - Lines of I&M Rail Link, LLC*, STB Finance Docket No. 34177, slip op. at 9, n.16 (Service Date July 22, 2002) (citing *Class Exemption – Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810, 812 (1985)).

The Board itself appears to understand the implications of MCM's filings. In its March 20th Decision, the Board stressed "that, under 49 U.S.C. § 10903 and 49 C.F.R. pt. 1152, if Baltimore Industrial Railway, MCM, or any other operator decides to abandon or discontinue service on the Line, it must file with the Board for authority to abandon or discontinue operations before doing so." March 20th Decision, slip op. at 4. The Board has correctly decided to stay the effectiveness of the Notice pending additional information regarding HRE's regulatory status, as well as require MCM to choose either exempt petition or notice procedures. However, even after resolving these outstanding issues the Board may not have enough information to determine whether its exemption proceedings provide an appropriate vehicle for the proposed acquisition of the Line, when the apparent intent of the new owners is to facilitate the deconstruction and salvaging of the Line. Requiring MCM and HRE to provide basic additional information regarding its intent to actually operate the Line, rather than deconstruct and salvage it, will ensure the integrity of the process.

WHEREFORE, and in view of the foregoing, MDOT respectfully requests this Board to grant its Petition for Leave to Intervene in these proceedings in order to allow MDOT to protect its interests and ensure preservation of rail service on the Line.

Dated: April 8, 2013

Respectfully submitted,



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Certificate of Service

I hereby certify that I have this 8th day of April, 2013, caused to be served a copy of the foregoing Petition of the Maryland Department of Transportation for Leave to Intervene upon the following parties of record by first class mail, with postage prepaid:

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