

BOYLE & MILLER

A PROFESSIONAL ASSOCIATION

211166
Attorneys at Law

GBU Building
4232 Brownsville Road, Suite 348
Pittsburgh, PA 15227-3330
rgb@attybobb.com
Phone: (412) 884-0770
Fax: (412) 884-3550

ROBERT G. BOYLE, ESQ.
FREDERICK A. MILLER, ESQ.

Downtown office
LL 500 Ft. Pitt Commons Building
(by appointment only)

ENTERED
Office of Proceedings

JUN - 4 2004

Part of
Public Record

May 28, 2004

Hon. Vernon A. Williams
Secretary, Surface Transportation Board
Mercury Building, #711
1925 K Street, N.W.
Washington, D.C. 20423-0001



Sub 1

Re: STB Finance Docket No. 34462; MVC Transportation, LLC
-Acquisition Exemption - P&LE Properties, Inc.

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are the original and ten copies of MVC Transportation, LLC's Petition for Expedited Declaratory Order.

Pursuant to 49 C.F.R. §1002(e), Petitioner respectfully requests the waiver of the Board's \$1,400 filing fee. Petitioner has already paid a \$1,400 filing fee in connection with the original Notice of Exemption filed on April 8, 2004 in this proceeding and has incurred substantial expense in asserting the jurisdiction of the Surface Transportation Board before the Common Pleas Court of Allegheny County. Moreover, waiver of the filing fee in this case is in the public interest inasmuch as MVC is attempting to prevent the unauthorized sale of common carrier railroad facilities for salvage in violation of the ICC Termination Act of 1995. In light of these circumstances, payment of an additional \$1,400 filing fee for this Petition for Expedited Declaratory Order would constitute an undue hardship on MVC Transportation, LLC.

FEE RECEIVED

JUN 4 - 2004

SURFACE
TRANSPORTATION BOARD

FILED

JUN 4 - 2004

SURFACE
TRANSPORTATION BOARD

21166

EXPEDITED CONSIDERATION REQUIRED

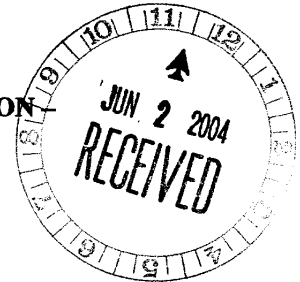
Before the

SURFACE TRANSPORTATION BOARD

Finance Docket No. 34462 SUB - No. 1

COPY

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



**MVC TRANSPORTATION, LLC'S
PETITION FOR EXPEDITED DECLARATORY ORDER**

Filed on Behalf of MVC Transportation, LLC

By:

Robert G. Boyle, Esq.
PA I.D. #49482
4232 Brownsville Road
Suite 348
Pittsburgh, PA 15227-3330
(412) 884-0770
(412) 884-3550

ENTERED
Office of Proceedings

JUN - 4 2004

Part of
Public Record

FILED

JUN 4 - 2004

**SURFACE
TRANSPORTATION BOARD**
ENTERED
Office of Proceedings

JUN - 4 2004

Part of
Public Record

Date: June 1, 2004

FEE RECEIVED

JUN 4 - 2004

**SURFACE
TRANSPORTATION BOARD**

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34462



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

**MVC TRANSPORTATION, LLC’S
PETITION FOR EXPEDITED DECLARATORY ORDER**

I. RELIEF REQUESTED AND REASON FOR EXPEDITION

Pursuant to 5 U.S.C. §554(e) MVC Transportation, LLC (“MVC”) files this Petition for Expedited Declaratory Order with the Surface Transportation Board in the above captioned proceeding seeking a determination that claims by Proline Railroad Track Company (“Proline”) filed in the Common Pleas Court of Allegheny County, Pennsylvania challenging MVC’s acquisition of the McKees Rocks Yard constitute an impermissible collateral attack on the jurisdiction of the Federal Surface Transportation Board and that the Common Pleas Court of Allegheny County, Pennsylvania is without jurisdiction to render relief requested by Proline in Proline Track Company v. Mariah Venture Capital and Consulting, Inc., No. GD-03-025297. This litigation is a cloud on MVC’s title to the McKees Rocks Yard and interferes with MVC’s subsequent use and/or sale of said property for common carrier rail purposes.

A copy of the Proline Complaint is attached as Exhibit A to this Petition. In response thereto, Mariah filed preliminary objections asserting that the Common Pleas Court did not have subject matter jurisdiction over the purported acquisition of common carrier rail facilities by Proline. (Exhibit B) Mariah also sought dismissal of this action in that the issue of whether track

materials within McKees Rocks Yard constituted exempt track or regulated common carrier track was subject to the exclusive jurisdiction of the Surface Transportation Board under the ICC Termination Act of 1995. On May 17, 2004, the Common Pleas Court of Allegheny County refused to recognize the STB's exclusive jurisdiction over these issues and denied Mariah's preliminary objections without a decision. (Exhibit C)

MVC seeks a prompt determination of the foregoing issues so that CSX Transportation, Inc. ('CSXT') can begin a timely and efficient relocation of yard facilities in the Pittsburgh, Pennsylvania area from Glenwood Yard to the McKees Rocks Yard so that the Glenwood Yard can be made available for an important regional highway construction project extending the Mon-Fayette Expressway into the City of Pittsburgh. (See Exhibit D).

II. FACTUAL BACKGROUND

Through a series of transactions commenced in March, 1997, approximately 105 acres of railroad property and track comprising the former Pittsburgh & Lake Erie Railway Company rail yard at McKees Rocks, PA was sold by P&LE Properties, Inc. ("P&LE Properties") under a bankruptcy court order to Allegheny Railroad Properties, Inc. ("ARP"). ARP then purportedly resold track materials within the McKees Rocks Yard for salvage to subsequent purchasers the last of which is Proline.

As indicated in the April 8, 2004 Notice of Exemption filed by MVC, on April 22, 1997, P&LE Properties accepted a cognovit judgment note and mortgage on the McKees Rocks Yard property from ARP as part of the proposed sale of that property. However, this sale did not close because ARP defaulted under the agreement of sale. (See John D. Hartman, Affidavit of Ownership Attachment A to Notice of Exemption). Thereafter the note and mortgage was acquired and satisfied by Mariah with approval of the U.S. Bankruptcy Court for the District of Delaware in In Re: Pittsburgh & Lake Erie Properties, Inc., Case No. 96-406, by Order dated

June 18, 1999. (Attachment B to Notice of Exemption). On December 16, 2003, Proline filed suit in the Common Pleas Court of Allegheny County, PA against Mariah claiming to have purchased the track materials in McKees Rocks Yard.

With the consent of P&LE Properties, Mariah assigned the ARP note and mortgage to MVC which, in lieu of execution and foreclosure, by deed and bill of sale from P&LE, took title to the rail yard facilities for continued rail operations subsequent to the effective date of the acquisition exemption in this proceeding.¹

III. McKees Rocks Yard – Common Carrier Status

P&LE Properties was in bankruptcy at the time of the 1997 sale of the McKees Rocks Yard to ARP. The McKees Rocks Yard parcel was excluded from the sale of the P&LE main line to CSXT because at the time of that transaction, CSXT did not need another rail yard in the Pittsburgh area. However, it is important to note that the sale of the P&LE main line and all other P&LE rail facilities to CSXT required that CSXT obtain STB approval of that transaction. Three Rivers Railway Company – Acquisition and Operation Exemption – The Pittsburgh and Lake Erie Railroad Company, Finance Docket 32055 (September 29, 1992).

In the 1997 ARP sale transaction, P&LE Properties retained title to the McKees Rocks Yard which under Pennsylvania's assembled industrial plant doctrine was subject to the lien of the ARP mortgage even though certain portions of the track in the rail Yard were not "permanently attached" to the real estate. Under the then applicable Pennsylvania statute, 12 Pa.C.S.A. §9801, all machinery and facilities necessary for the operation of an industrial or commercial enterprise and placed on the enterprise's land for permanent use were subject to the

¹ Initially Mariah was unaware of the continuing common carrier status of the McKees Rocks Yard track facilities, but when advised of that status by representatives of McKees Rocks Depot, a rail shipper located in the yard, Mariah consulted with STB staff and learned the yard had never been abandoned and that its acquisition would require an STB exemption.

lien of a mortgage on plant property. Moreover, none of the purported purchasers of track materials from ARP obtained a release from the recorded ARP mortgage.

Furthermore, P&LE Properties did not obtain STB approval under 49 U.S.C. §10905 to abandon and discontinue rail service within McKees Rocks Yard nor did it seek approval from the bankruptcy court under 11 U.S.C. §1170 to abandon and liquidate McKees Rocks Yard rail facilities for non railroad purposes. Despite the fact that P&LE Properties sold most of its common carrier rail facilities to CSXT in 1991 and 1992, it retained the McKees Rocks Yard and under lease agreements between P&LE Properties and industries situated in McKees Rocks Yard, various railroad yard tracks were used by those shippers to obtain common carrier rail service from CSXT. CSXT provided common carrier rail service to AC Railroad, Inc., a car salvage and repair shop, and to Trinity Industries, a car rebuilding company. CSXT provides common carrier rail service also to Clifton Steel Company, Bryan Cement, and Castriota Metals Recycling, Inc. at the Yard. Moreover, CSXT continued to use the mainline tracks through McKees Rocks Yard. Thus, P&LE Properties throughout its bankruptcy administration was the owner of tracks used by shippers and CSXT for common carrier rail service.

Since the tracks in McKees Rocks Yard remained subject to a common carrier rail service obligation, these tracks could not be sold for salvage without STB or bankruptcy court abandonment authorization. Furthermore, neither ARP nor any subsequent purchaser from ARP including Proline sought STB acquisition authority under 49 U.S.C. §10901 to acquire these common carrier rail assets for continued railroad purposes.

In 1999 when ARP defaulted on its note and mortgage obligations to P&LE Properties, Mariah sought and obtained approval from the bankruptcy court to purchase the note and mortgage secured by the McKees Rocks Yard from P&LE Properties. None of the purported track purchasers objected to the entry of the bankruptcy court order authorizing Mariah's

purchase of the ARP note and mortgage. Mariah satisfied the P&LE note and mortgage with a payment of \$950,000 into the bankruptcy court but did not immediately take title to the railroad tracks and rail facilities in McKees Rocks Yard. Rather Mariah assigned the ARP note and mortgage to MVC so that MVC could acquire the rail Yard facilities with STB approval.

The above facts demonstrate that the tracks and rail facilities in McKees Rocks Yard are common carrier facilities subject to the jurisdiction to the STB. First, CSXT has utilized these tracks and rail facilities to provide common carrier service to various shippers. Moreover, these tracks are not stub ended but provide connections for CSXT to serve multiple shippers and connect to its main lines. CSXT has used these tracks to move a substantial volume of traffic in through service to and from out of state locations. These tracks were formally owned and operated by P&LE as a common carrier rail facility and no abandonment authorization for the Yard was obtained from the STB. Thus, under the criteria examined by the STB in connection with 49 U.S.C. §10906 exempted track determinations, the McKees Rocks Yard rail facilities remain subject to the exclusive jurisdiction of the Surface Transportation Board. See CNW – Abandonment Exemption – In McHenry County, IL, 3 ICC 2d. 366 (1987, rev'd on other grounds sub. nom. Illinois Commerce Commission v. ICC, 879 F.2d. 917 (D.C. Cir. 1989); New Orleans Terminal Company v. Spenser, 366 F.2d 160, 164 (5th Cir. 1966); Nicholson v. ICC, 711 F.2d 364, 367 (D.C. Cir 1983); Railway Labor Executives Assn. et al. v. City of Galveston, 849 F.2d 145, 148 (5th Cir. 1988); Chicago Rail Link, LLC – Lease Operation Exemption – Union Pacific Railroad Company, STB Finance Docket No. 33323 (Sept. 2, 1997); Effingham Railroad Company – Petition for Declaratory Order – Construction at Effingham, IL, STB Docket No. 41986 (Sept. 18, 1998).

As clearly indicated by the Proline complaint, the acquisition of track materials within McKees Rocks Yard by ARP and subsequent purchasers from ARP was solely for the purpose of

salvaging track materials. The STB has repeatedly admonished various parties for improper acquisition of common carrier rail assets for the purposes of salvage without obtaining STB abandonment authority and where necessary voided those transactions. See STB Docket No. AB-556 (Sub No. 2x) Railroad Ventures, Inc. – Abandonment Exemption – Between Youngstown, Ohio and Darlington, PA in Mahoning and Columbiana Counties, Ohio and Beaver County, Pennsylvania. 2001 STB Lexis 852, 2000 STB Lexis 588, 2000 STB Lexis 588, 2000 STB Lexis 8.; Sagamore National Corporation – Acquisition and Operation Exemption – Lines of Indiana Hi Rail, STB Finance Docket No. 32523, 32582. 1994 ICC Lexis 203; Illinois Central Railroad Co. – Abandonment Exemption- In St. Tammany Parish, LA, ICC Docket AB-43 (Sub. No. 154 X) 1992 ICC Lexis 133.

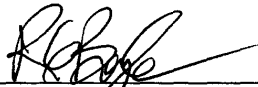
III. CONCLUSION

Based on the foregoing facts, ARP's purchase of the McKees Rocks Yard in 1997 was not preceded by an STB abandonment order for the Yard and was therefore invalid. Accordingly, as the assignee of the security interest of P&LE Properties under the ARP note and mortgage, MVC by bill of sale and deed in lieu of foreclosure, obtained from P&LE Properties all right, title and interest to the railroad property and track materials comprising the McKees Rocks Yard for continued common carrier rail service pursuant to the notice of exemption issued by the Board in this docket.

Conflicting claims, if any, by ARP or subsequent purchasers from ARP can only be resolved by the STB. Any attempt by those parties to collaterally attack the MVC acquisition in state or federal court is preempted by 49 U.S.C. §10502 (b). See Levin et. al v. SEDA-COG Joint Rail Authority et. al, U.S. District Court m.d. Pa. 4: CV-97-997 (Judge Muir) aff'd by order dated April 24, 1998, Third Cir. Ct. of Appeals (copy attached), Columbiana County Port Authority v. Boardman Township Park District, 154 F. Supp. 2d 1165 (U.S.D.C., N.D. OH 2001)

MVC therefore respectfully requests that the STB issue an order in aid of its jurisdiction advising the Allegheny County Common Pleas Court that the state law claims and relief sought by Proline before that court are preempted by 49 U.S.C. §10501(b).

Respectfully submitted,

By: 
Robert G. Boyle, Esq.
Attorney for Mariah Venture Capital
& Consulting, Inc. and MVC
Transportation, LLC

4232 Brownsville Road, Suite 348
Pittsburgh, PA 15227-3330
(412) 884-0770
(412) 884-3550
rgb@attybobb.com

Date: June 1, 2004

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Petition for Expedited Declaratory Order was served this 1st day of JUNE, 2004, by first class, United States mail, postage prepaid, upon the following:

Roger P. Nober, Chairman
Surface Transportation Board
1925 K. Street, N.W.
Washington, D.C. 20423-0001

Melvin Clemens, Director of Enforcement
Surface Transportation Board
1925 K. Street, N.W.
Washington, D.C. 20423-0001

Ellen Hanson, General Counsel
Surface Transportation Board
1925 K. Street, N.W.
Washington, D.C. 20423-0001

Mary Beth Buchanan, U.S. Attorney
633 U.S. Post Office & Courthouse
Pittsburgh, PA 15219

Jay D. Martinstein, Esq.
Fox Rothschild, LLP
Dominion Tower, 29th Floor
625 Liberty Avenue
Pittsburgh, PA 15222

CSX Transportation, Inc.
Mr. J.C. Barker
301 West Bay Street
Suite 800, SC J-915
Jacksonville, FL 32202



Robert G. Boyle

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

PROLINE RAILROAD
TRACK CO.,

Plaintiff,

v.

MARIAH VENTURE CAPITAL
& CONSULTING, INC.,

Defendant.

CIVIL DIVISION

No. **GD-03-025297**

CIVIL ACTION - COMPLAINT

Filed on Behalf of:

ProLine Railroad Track Co.,
Plaintiff

Counsel of Record for
This Party:

Jay D. Marinstein
Pa. I.D. #53163

Patrick L. Abramowich
Pa. I.D. # 74494

FOX ROTHSCHILD LLP
Dominion Tower, 29th Floor
625 Liberty Avenue
Pittsburgh, PA 15222

(412) 391-1334

03 DEC 16 PM 3:32
FILED
PROTHONOTARY
ALLEGHENY COUNTY

JURY TRIAL DEMANDED

EXHIBIT A

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

PROLINE RAILROAD
TRACK CO.,

Plaintiff,

v.

MARIAH VENTURE CAPITAL
& CONSULTING, INC.,

Defendant.

CIVIL DIVISION

No.

CIVIL ACTION - COMPLAINT

Filed on Behalf of:

ProLine Railroad Track Co.,
Plaintiff

Counsel of Record for
This Party:

Jay D. Marinstein
Pa. I.D. #53163

Patrick L. Abramowich
Pa. I.D. # 74494

FOX ROTHSCHILD LLP
Dominion Tower, 29th Floor
625 Liberty Avenue
Pittsburgh, PA 15222

(412) 391-1334

JURY TRIAL DEMANDED

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

PROLINE RAILROAD
TRACK CO.,

Plaintiff,

v.

MARIAH VENTURE CAPITAL &
CONSULTING, INC.,

Defendant.

) CIVIL DIVISION
) No.
)
)
)
)
)
)
)
)
)

NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

LAWYER REFERRAL SERVICE
THE ALLEGHENY COUNTY BAR ASSOCIATION
Koppers Building, Suite 400
436 Seventh Avenue
Pittsburgh, PA 15219
Telephone: (412) 261-0518

PROLINE RAILROAD
TRACK CO.,

v.

Defendant.

CIVIL DIVISION
No.

Plaintiff, ProLine Railroad Track Co., by its undersigned counsel, Fox Rothschild LLP, files the following Civil Action – Complaint (“Complaint”) averring as follows:

1. Plaintiff, ProLine Railroad Track Co. ("ProLine"), is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with a principal place of business located in Allegheny County.

2. Defendant Mariah Venture Capital & Consulting, Inc. ("Mariah") is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with a principal place of business at 98 Glenbury Street, Pittsburgh, Allegheny County, Pennsylvania 15234.

JURISDICTION AND VENUE

3. Defendant Mariah is subject to personal jurisdiction in Pennsylvania as it is a Pennsylvania corporation and regularly transacts business and maintains a principal place of business within the Commonwealth.

4. Venue is proper pursuant to Pa.R.C.P. 2179, since Mariah's principal place of business is located in Allegheny County, Mariah regularly conducts business in Allegheny County, and occurrences out of which the cause of action arose took place in Allegheny County.

BACKGROUND

5. On or about April 21, 1998, ProLine Services, Inc. entered into an Asset Purchase Agreement with Kovalchick Corporation (the "Asset Purchase Agreement") to acquire 10.5 +/- miles of railroad track and trackage including railroad ties, switches, frogs, tie plates and related material located in McKees Rocks Borough and Stowe Township, Allegheny County, Pennsylvania (collectively, the "Track"). A true and correct copy of the April 21, 1998 Asset Purchase Agreement is attached hereto as Exhibit 1 and incorporated by reference as if set forth in full.

6. Kovalchick possessed free and clear title to the Track as of the date of the Asset Purchase Agreement.

7. Subsequent to the Asset Purchase Agreement, ProLine Services, Inc. assigned all of its rights, title and interest under the Asset Purchase Agreement to ProLine.

8. At a closing on or about May 8, 1998, Kovalchick Corporation delivered to ProLine a Bill of Sale for the Track, a true and correct copy of which is attached hereto as Exhibit 2 and incorporated by reference as if set forth in full.

9. On or about September 22, 2003, ProLine entered into a contract with AllenRailroad.Com ("ARC"), pursuant to which ARC agreed, *inter alia*: (i) to perform a complete and thorough inventory of the Track; (ii) to compile inventory records; (iii) to provide ProLine with the resale value of the Track; (iii) to conduct an internet-based auction of the Track; (iv) to actively promote the auction by telephone and e-mail and (v) to provide offers to ProLine. A true and correct copy of the September 22, 2003 contract between ProLine and ARC (the "ARC Contract") is attached hereto as Exhibit 3 and incorporated by reference as if set forth in full.

10. ProLine paid \$3,000 to ARC, which constituted 50 percent of the total cost estimate, as required by the ARC Contract. ARC conducted the inventory, prepared inventory records, and prepared the internet-based auction of the Track (the "Auction").

11. In or around October 2003, while ARC was in the process of listing ProLine as the Auction sponsor and ARC as the auctioneer, upon information and belief, Mariah approached ARC and falsely claimed ownership of the Track.

12. As a result of intentional misrepresentations made by Mariah, ARC refused to list ProLine as the sponsor of the Auction; instead, Mariah was listed as the sponsor. In sponsoring the Auction, Mariah utilized the inventory records, website design, and promotional efforts for which ProLine paid ARC pursuant to the Contract.

13. Subsequent to Mariah's misrepresentations, Mariah and/or its authorized agents/contractors falsely told potential buyers that the Track was owned by Mariah and disparaged ProLine's character and reputation for attempting to sell the Track through the Auction.

14. On or about December 8, 2003, ProLine wrote to Mariah and ARC demanding: (i) that Mariah and ARC immediately terminate the Auction and confirm the same; and (ii) that Mariah confirm that ProLine is the owner of the Track; in each case by 5:00 p.m. EST on Wednesday, December 10, 2003. True and correct copies of ProLine's December 8, 2003 letters to Mariah and Allen are attached hereto collectively as Exhibit 4 and incorporated by reference as if set forth in full. ProLine further notified Mariah that it would consider Mariah's refusal to confirm ProLine's ownership of the Track as a conversion.

15. While Mariah agreed to terminate the Auction, Mariah has refused to repudiate its claim to ownership of the Track and/or acknowledge ProLine's ownership.

COUNT I - CONVERSION

16. ProLine hereby incorporates by reference Paragraphs 1 through 15 of the Complaint as though set forth in full.

17. The Track is a chattel in which ProLine possesses full title and interest, including the rights to use, possess, and sell the Track.

18. Mariah has interfered with ProLine's rights of use and possession of the Track without ProLine's consent by, *inter alia*:

- (a) inducing ARC not to list ProLine as the sponsor of the Auction;
- (b) offering to sell the Track as the sponsor of the Auction;
- (c) falsely telling third parties that ProLine is not the owner of the Track; and
- (d) refusing to acknowledge ProLine's right to immediate use and possession of the Track after proper demand.

19. Mariah's conduct as set forth in Paragraph 18 is not legally justified or privileged and was undertaken with willful intent, malicious intent and/or reckless indifference to ProLine's rights.

20. ProLine has suffered damages as a result of Mariah's conversion including, but not limited to, the reasonable value of the Track, the amounts paid pursuant to the ARC Contract, potential liability on the ARC Contract, lost proceeds from the Auction, and harm to its reputation.

WHEREFORE, Plaintiff, ProLine Railroad Track Co., demands judgment against Defendant Mariah Venture Capital & Consulting, Inc., in an amount in excess of \$25,000, plus interest, punitive and exemplary damages, attorneys' fees, costs, and such other relief as justice requires.

COUNT II - TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS

21. ProLine hereby incorporates by reference Paragraphs 1 through 20 of the Complaint as though set forth in full.

22. The ARC Contract created a contractual relationship between ProLine and ARC. Moreover, ProLine had prospective contractual relationships with potential buyers of the Track.

23. Mariah purposefully and intentionally interfered with the contractual relationship between ProLine and ARC, and with the prospective contractual relationships between ProLine and potential buyers of the Track, by, *inter alia*:

- (a) falsely stating that ProLine did not own the Track;
- (b) falsely stating that Mariah owns the Track;
- (c) disparaging ProLine's reputation and character;
- (d) inducing ARC not to list ProLine as the sponsor of the Auction; and
- (e) offering to sell the Track through the Auction, utilizing the services for which ProLine paid pursuant to the ARC Contract.

24. Mariah's conduct as set forth in Paragraph 23 was malicious, willful, reckless, and without legal justification or privilege.

25. ProLine has suffered damages as a result of Mariah's tortious interference with the ARC Contract and interference with the prospective contractual relationships with potential buyers of the Track including, but not limited to, the loss of the Auction proceeds, the amounts paid pursuant to the ARC Contract, potential liability on the ARC Contract, and harm to its reputation.

WHEREFORE, Plaintiff, ProLine Railroad Track Co., demands judgment against Defendant Mariah Venture Capital & Consulting, Inc., in an amount in excess of \$25,000, plus interest, punitive and exemplary damages, attorneys' fees, costs, and such other relief as justice requires.

COUNT III - DECLARATORY JUDGMENT

(Pled in the Alternative)

26. ProLine hereby incorporates by reference Paragraphs 1 through 25 of the Complaint as though set forth in full.

27. In the event that this Honorable Court does not grant the relief sought in Count I for conversion, ProLine alleges in the alternative that an actual controversy exists between ProLine and Mariah with regard to ownership of the Track as set forth more specifically above.

28. A declaration regarding ownership of the Track will be a practical help in ending the controversy that exists between ProLine and Mariah with regard to ownership of the Track.

29. The relief sought in Count III is authorized by the Pennsylvania Declaratory Judgments Act, 42 Pa.C.S.A. § 7531 *et seq.*

WHEREFORE, Plaintiff, ProLine Railroad Track Co., requests, in the alternative to Count I, that the Court to enter judgment:

- (a) declaring that ProLine possesses free and clear title to the Track;

- (b) declaring that neither Marjah nor its principals, agents, affiliates, parents, subsidiaries, successors, or assigns possesses any right, title, or interest in the Track; and
- (c) granting such further relief as the Court may deem appropriate.

A JURY TRIAL IS DEMANDED.

Respectfully submitted,

FOX ROTHSCHILD LLP

By: Jay D. Marinstein
Jay D. Marinstein
Pa. I.D. #53163

Patrick L. Abramowich
Pa. I.D. # 74494

Dominion Tower, 29th Floor
625 Liberty Avenue
Pittsburgh, PA 15222-3115
(412) 391-1334

Counsel for Plaintiff,
ProLine Railroad Track Co.

can use your browser **BACK** button to return to previous page.

[\[New Case Number\]](#) [\[Docket Report\]](#) [\[Account Information\]](#) [\[Home\]](#)

03-025297

Proline Railroad Track Co. vs Mariah Venture Capit

Date:	12/16/2003	Case Type:	Declaratory Judgment
Time:	03:18:22	Court Type:	General Docket
ed Cases:		Current Status:	Order of Court
3:	No Judge	Jury Requested:	Yes
nt In Dispute:	\$.00		

on PartyID hyperlink to see Alternative name for the party.

Parties							
-- Litigants --							
	LName	FName	MI	Type	Address	Phone	Attorney
197711	Proline Railroad Track Company	---	---	Plaintiff	No Default Address Available	--	Marinstein Jay D,
197712	Mariah Venture Capital & Consulting Inc.	---	---	Defendant	98 Glenbury Street Pittsburgh PA 15234	--	--
-- Attorney --							
	LName	FName	MI	Type	Address	Phone	
163	Marinstein	Jay	D	Plaintiff's Attorney	Fox Rothschild LLP 625 Liberty Avenue, 29th floor Pittsburgh PA 15222-3115	(412) 3911334	
-- Non Litigants --							
	LName	FName	MI	Type	Address	Phone	
IRF02	Sheriff - Allegheny County	---	---	Sheriff	No Default Address Available	--	

on DocketType hyperlink to see Judgments for that Docket.

Docket Entries Docket Filing Date From 12/01/2003 To 05/25/2004				
ng e	Docket Type	Docket Text	Filing Party	Document
18/2004	Order of Court	Dated 05/17/04. Order that the P.O.'s of Deft. Mariah Venture Capital & Consulting Inc. are dismissed and answer to be filed in 20 days. Farino J. eodie copies mailed 05/18/04.	Mariah Venture Capital & Consulting Inc.	Document 1
18/2004	Order of Court	Dated 05/17/04. Order the Plt's. Motion for Sanctions is denied. Farino J.	Proline Railroad Track Company	Document 2
11/2004	Brief in Support	to def't's preliminary objections for lack of subject matter jurisdiction. hearing date 5/17/04 at 10:30 a.m.	Proline Railroad Track Company	Document 3
05/2004	Order of Court	Dated 05/04/04. Order that said Petition is granted and Bernstein Law Firm P.C. is granted leave to withdraw as counsel for Defendant. Immediate notice to be given to Defendant that no	Mariah Venture Capital & Consulting Inc.	Document 4

://prothonotary.county.alleghen

EXHIBIT B

CaseID=GD-03-025... 5/26/2004

		extension of time will be given. Farino J.		
1/2004	Praeipie	to withdraw appearance of Nicholas D. Krawec a counsel for deft.	Mariah Venture Capital & Consulting Inc.	Document 5
1/2004	Praeipie	to Classify def't's Prelimianry Obejctions as "preliminary objections raising issues of fact pursuant to local rule 1028* (G) and to reschedule argument date. hearing dte 5/17/04	Mariah Venture Capital & Consulting Inc.	Document 6
3/2004	Preliminary Objections	for lack of subject matter jurisdicthin pursuant to Pa. R.C.P. brief in support and proposed order. hearing date 3/17/04 at 10:15 a.m.	Proline Railroad Track Company	Document 7
3/2004	Sheriff Return	Mariah Venture Capital & Consulting Inc. served with Notice of Suit & Complaint on 01/15/04.	Sheriff - Allegheny County	Document 8
3/2003	Complaint	returnable 01/15/04	Proline Railroad Track Company	Document 9

don't have Adobe Acrobat Reader to view documents, you can get it here.



3-1704
noters/015

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

PROLINE RAILROAD TRACK CO.,

Plaintiff,

NO. GD 03-025297

v.

MARIAH VENTURE CAPITAL &
CONSULTING, INC.,

Defendant.

DEFENDANT'S PRELIMINARY
OBJECTION FOR LACK OF SUBJECT
MATTER JURISDICTION, PURSUANT TO
PENNSYLVANIA RULE OF CIVIL
PROCEDURE 1028(a)(1) AND BRIEF IN
SUPPORT THEREON

04 FEB 18 PM 3:22
COURT OF COMMON PLEAS

FILED ON BEHALF OF
Defendants

COUNSEL OF RECORD OF THIS PARTY:

JON A. MCKECHNIE, ESQ.
PA I.D. #36268
Bernstein Law Firm, P.C.
Firm #718
Suite 2200 Gulf Tower
Pittsburgh, PA 15219
412-456-8100
DIRECT DIAL: (412) 456-8110

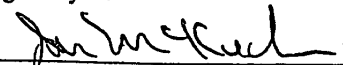
FILED
2004 MAY 13 AM 8:03
PROTHONOTARY
ALLEGHENY COUNTY

To: JAY D. MARINSTEIN, ESQ.

BERNSTEIN FILE NO. 69917700

You are hereby notified to file
a written response to the enclosed
PRELIMINARY OBJECTION
within twenty (20) days from service
hereof or a judgment may be entered
against you.

PROTHONOTARY
ALLEGHENY COUNTY


Bernstein Law Firm, P.C.

2004 FEB 19 PM 9:40

2004 MAY 17 AM 11:45
COURT OF COMMON PLEAS

FILED

JAM001133V001
2/18/2004

3-1704

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

PROLINE RAILROAD TRACK CO.,

Plaintiff,

NO. GD 03-025297

v.

MARIAH VENTURE CAPITAL &
CONSULTING, INC.,

Defendant.

**DEFENDANT'S PRELIMINARY OBJECTION FOR LACK OF SUBJECT MATTER
JURISDICTION, PURSUANT TO PENNSYLVANIA RULE OF CIVIL PROCEDURE 1028(a)(1)**

AND NOW, comes Defendant, Mariah Venture Capital & Consulting, Inc., by and through its counsel, the Bernstein Law Firm, P.C., and files the following Preliminary Objection in accordance with P.A.R.C.P. Rule 1028(a)(1) and in support thereof avers the following:

I. Preliminary Objections Based upon Lack of Subject Matter Jurisdiction.

1. On December 16, 2003, Plaintiff filed a Complaint in Civil Action against the Defendant claiming that Plaintiff is the owner of railroad track located at the former Pittsburgh & Lake Erie Railroad Company McKees Rocks Yard in McKees Rocks, PA.

2. Said Plaintiff's Complaint avers that Plaintiff has free and clear title to said railroad track pursuant to an Asset Purchase Agreement and that Plaintiff entered into a contract with an internet auctioneer to sell said railroad track.

3. The federal Surface Transportation Board maintains exclusive subject matter jurisdiction over the ownership and disposition of common carrier track.

4. However, to date, no application for abandonment has been filed by any party with the federal Surface Transportation Board.

5. P.A.R.C.P. 1028(a)(1) provides that preliminary objections may be filed by any party for lack of jurisdiction over the subject matter of the action.

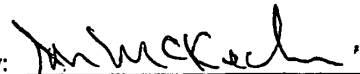
6. Plaintiff's Complaint violates P.A.R.C.P. Rule 1028(a)(1) in that the federal Surface Transportation Board has exclusive jurisdiction over ownership and disposition of said railroad tracks.

7. Plaintiff's Complaint fails to conform to the applicable Pennsylvania Rule of Civil Procedure.

WHEREFORE, Defendant, Mariah Venture Capital & Consulting, Inc., requests that this Honorable Court sustain its Preliminary Objection based upon lack of subject matter jurisdiction.

Respectfully submitted,

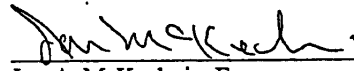
BERNSTEIN LAW FIRM, P.C.

By: 

Jon A. McKechnie, Esq.
Attorney for Defendant
PA I.D. #36268
Suite 2200 Gulf Tower
Pittsburgh, PA 15219
(412) 456-8110

VERIFICATION

The undersigned does hereby verify under penalty of perjury, that he is the attorney for Mariah Venture Capital & Consulting, Inc., Defendant herein, that he is duly authorized to make this Verification and that the facts set forth in the foregoing PRELIMINARY OBJECTION are true and correct to the best of his knowledge, information and belief.



Jon A. McKechnie, Esq.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

PROLINE RAILROAD TRACK CO.,

Plaintiff,

NO. GD 03-025297

v.

MARIAH VENTURE CAPITAL &
CONSULTING, INC.,

Defendant.

**BRIEF IN SUPPORT OF DEFENDANT'S PRELIMINARY OBJECTION FOR LACK OF
SUBJECT MATTER JURISDICTION, PURSUANT TO PENNSYLVANIA RULE OF CIVIL
PROCEDURE 1028(a)(1)**

AND NOW, comes Defendant, Mariah Venture Capital & Consulting, Inc., by and through its counsel, the Bernstein Law Firm, P.C., and files the following Brief in Support its Preliminary Objection in accordance with P.A.R.C.P. Rule 1028(a)(1) and in support thereof aver the following:

I. NARRATIVE STATEMENT

1. In March 1997, Pittsburgh & Lake Erie Properties, Inc. ("P&LE") was approved by a Delaware bankruptcy court to sell 105 acres of real property "containing various improvements and track, formerly switching yards, maintenance, refueling and other facilities" of P&LE to Allegheny Railroad Properties ("ARP").
2. In April 1997, said sale was consummated and was secured by a Mortgage and Note in the amount \$1,200,000.00 from ARP to P&LE, subject to Pennsylvania's assembled industrial plant doctrine, and recorded in the Allegheny County Recorder of Deeds Office at Mortgage Book Volume 16566, Page 473.

3. No approval from the federal Surface Transportation Board for abandonment of the railroad track pursuant to 49 USCS § 10903 was sought by any party.
4. In May 1997, ARP sold track material, rail, switches and ties to Kovalchick Corporation.
5. In April 1998, Kovalchick Corporation sold 10.5 +/- miles of railroad track and trackage including railroad ties, switches, frogs, tie plates and related material which included all railroad trackage purchased by Kovalchick from ARP to Plaintiff.
6. In June 1999, said Mortgage and Note were assigned to Defendant for the amount of \$950,000.00 and recorded in the Allegheny County Recorder of Deeds Office at Mortgage Book Volume 19300, Page 559.
7. In September 2003, Plaintiff attempted to sell railroad track as scrap through an internet website auctioneer, AllenRailroad.Com.
8. On December 16, 2003, Plaintiff filed this instant action claiming that Plaintiff has free and clear title to the Railroad track subject to the auction sale and has plead conversion, tortious interference with contractual relations and, in the alternative, relief by declaratory judgment as to ownership of the railroad track.

II. STATEMENT OF ISSUE

Pennsylvania state courts lack subject matter jurisdiction over common carrier railroad trackage that is subject to abandonment and the federal Surface Transportation Board retains exclusive jurisdiction over resolution of the issue of abandonment and subsequent ownership of the subject trackage.

III. MEMORANDUM OF LAW

Although P&LE was in bankruptcy at the time of the sale of the McKees Rocks Yard ("Yard"), it remained a common carrier railroad facility subject to STB jurisdiction. Any sale or disposition of the Yard facilities for non railroad purposes would have required an abandonment order from the STB. The sale of real estate and track material associated with the Yard between P&LE and ARP was without STB abandonment authority and therefore the Yard remains subject to STB jurisdiction and common carrier obligations with respect to the rail service provided over its tracks and rail facilities to various shippers who were/are located in or relocated to the Yard facility.

49 U.S.C.S. §10901(a) provides that a person (i.e., a rail carrier or a non-rail carrier) may (1) construct an extension to any of its railroad lines, (2) construct an additional railroad line, (3) acquire or operate a rail line or an extended or additional railroad line, or (4) provide transportation over, by means of, an extended or additional rail line, only if the Surface Transportation Board ("STB") finds that the present or future public convenience and necessity require or permit the construction and/or acquisition, and operation, of the railroad line.

Non-carriers that acquire rail lines must obtain authority under Section 10901 or an exemption therefrom, even if they have contracted before hand with a separate entity to provide service over that line. Genessee and Mohawk Valley RR Co. – Acquisition and Operation Exemption – Consolidated Rail Corp., Finance Docket No: 32169 (ICC Service Date September 30, 1993). In such cases, the non-operating purchaser of the line is generally subject to "residual common carrier authority" by virtue of its ownership of railroad assets. Where an operating carrier agrees to provide rail service over the rail line owned by a non-operating entity the only obligation incurred as a result of residual common carrier authority is to obtain another operator in the event the operating carrier can no longer provide service or to

file an abandonment application pursuant to 49 U.S.C.S. §10903 with the STB when the line is no longer needed for railroad service.

There are two Section 10901 exemptions that would take rail lines out of the reach of Section 10901(a). These are Section 10906 industrial side tracks and private line exemptions.

As to industrial side tracks, the STB focuses on the particular tracks' use, history and physical characteristics. It relies on a variety of factors including: the length of the track; whether it serves more than one shipper; whether it is stub ended; whether it was built to invade the territory of another railroad; whether the shipper is located at the end of the track; whether there is regularly scheduled service; the volume of traffic moving over the track; who owns and maintains the track; whether the track was constructed with light weight rail; the condition of the track; what the track is used for; and whether there are stations on the track. CNW – Abandonment Exemption – In McHenry County, IL, 2 ICC 2d. 366 (1987).

Had P&LE sold individual tracks or sidings not utilized by shippers to provide through rail service, many of those yard tracks might be subject to the Section 10906 exemption. However, when P&LE leased or sold yard property to rail shippers, who used yard tracks for through service, it subjected those yard tracks to common carrier status. Moreover, by selling the Yard to ARP as a complete entity, a portion of which was used for common carrier rail service to multiple shippers, it can be argued that in the absence of STB abandonment authority, the entire Yard retained its common carrier status as a railroad facility subject to STB jurisdiction.

As to private lines, Section 10901(a) STB jurisdiction is limited to lines that are "private". There are two kinds of private lines: those operated only by private carrier railroads and those operated by common carrier railroads. In the case of a private carrier private line, it is owned and operated by a corporate entity which conducts its own rail operations for the purposes of carrying shipments for its own

account. In the case of a private railroad operated by a common carrier railroad, the private line status is based on the acquisition or construction, ownership and maintenance of the rail line by a private entity but where the rail service is performed exclusively for that private entity by a common carrier railroad. New York Central RR Co. v. Southern Ry, 226 F.Supp. 463 (N.D. Ill. 1964), *aff'd per curiam* 338 F.2d. 667 (7th Cir. 1964).

The former P&LE community track and various rail facilities at the Yard are common carrier rail facilities subject to the jurisdiction of the STB. Shippers have at one time or another utilized these rail facilities to provide common carrier rail service to various shippers reached by these facilities including the community track itself. These tracks are not stub ended but provide connections to more than one shipper. The fact that these tracks were formerly owned and operated by P&LE as common carrier rail facilities and that no abandonment authorization was ever obtained with respect to the use of these tracks, confirms that despite the sale of the real estate and personal property comprising McKees Rocks Yard to noncarriers, these rail facilities remain subject to a common carrier obligation.

Finally, the United States Court of Appeals for the Third Circuit has held that the STB retains exclusive jurisdiction over the issue of abandonment and subsequent ownership. Said exclusive jurisdiction remains with the STB until the STB makes a determination of the status of the railroad tracks as community lines and as to their abandonment. William A. Lucas, et al. v. Township of Bethel, et al., 319 F.3d 595 (2003).

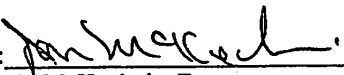
Any attempt to remove and sell the community track claimed by Plaintiff by which common carrier rail services are provided to various shippers located in the former P&LE property constitutes a violation of 49 U.S.C.S. §10903 and which requires abandonment authorization from STB before the disposition of common carrier rail assets. Since these tracks were originally owned by P&LE Company as part of its common carrier interstate rail system, and since it appears that no abandonment authorization

was obtained by P&LE or any subsequent purchaser of this property, these tracks remain part of the federally regulated interstate common carrier rail system over which common carrier rail service has been provided.

WHEREFORE, Plaintiff prays that this Honorable Court will dismiss Plaintiff's Complaint.

Respectfully submitted,

BERNSTEIN LAW FIRM, P.C.

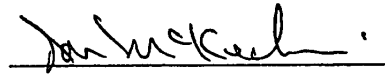
By: 
Jon A. McKechnie, Esq.
Attorney for Defendant
PA I.D. #36268
Suite 2200 Gulf Tower
Pittsburgh, PA 15219
(412) 456-8110

BERNSTEIN FILE NO. 69917700

CERTIFICATE OF SERVICE

I, Jon A. McKechnie, Esq., hereby certify that a true and correct copy of Defendant's Preliminary Objection for Lack of Subject Matter Jurisdiction, Pursuant to Pennsylvania Rule of Civil Procedure 1028(a)(1) and Brief in Support thereon were served on the following parties by regular U.S. Mail, postage prepaid, this 18th day of February, 2004, addressed as follows:

Jay D. Martinstein, Esq.
Fox Rothchild LLP
Dominion Tower, 29th Floor
625 Liberty Avenue
Pittsburgh, PA 15222



IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

PROLINE RAILROAD TRACK CO.,

CIVIL DIVISION

Plaintiff,

NO. GD-03-025297

vs.

SUPPLEMENTAL MEMORANDUM
OF LAW

MARIAH VENTURE CAPITAL &
CONSULTING, INC.

Defendant,

Filed on behalf of:
MARIAH VENTURE CAPITAL &
CONSULTING, INC., Defendants

Counsel of Record for this
Party:

Robert G. Boyle, Esquire
PA I.D. #49482

GBU Building, Suite 348
4232 Brownsville Road
Pittsburgh, PA 15227-3330

(412) 884-0770

in bankruptcy at the time of the sale of the McKees Rocks Yard ("Yard") to Allegheny Railroad Properties (hereinafter referred to as "ARP"), it remained a common carrier railroad facility subject to Surface Transportation Board (hereinafter referred to as "STB") jurisdiction. Any sale or disposition of the Yard facilities for non-railroad purposes would have required an abandonment order from the STB. The sale of real estate and track material associated with the Yard between P&LE and ARP was without STB abandonment authority and therefore the Yard remains subject to STB jurisdiction and common carrier obligations with respect to the rail service provided over its tracks and rail facilities to various shippers who were/are located in or relocated to the Yard facility. Had ACP intended to acquire the property for railroad purposes ARP would have also been required to obtain STB acquisition authorization to acquire the property for continued common carrier railroad purposes. Even if ACP had completed the payments as required by the Delaware District Bankruptcy Court the sale from P&LE would still have been null and void without obtaining authorization to acquire the property from the STB.

Railroad Ventures, Inc. - Abandonment Exemption - Between Youngstown, OH and Darlington, PA in Mahoning and Columbiana Counties, OH and Beaver County, PA, STB Docket AB -556 (Sub. No. 2X), 2001 STB Lexis 852, 2000 STB Lexis 588, 2000 STB Lexis 8,; Finance Docket No. 32523, 32582, 1994 ICC Lexis 203.

ARP defaulted in its payments to P&LE and Mariah Venture Capital & Consulting, Inc., purchased the Note and Mortgage with the approval of U.S. Bankruptcy Court for the District of Delaware by Order dated June 18, 1999 and attached hereto as Exhibit "A". ARP was notified of the sale date of the Note and Mortgage in Bankruptcy court and failed to attend the hearing or object to the sale. Also unlike ARP, Mariah or its assignee MVC Transportation, LLC did seek STB approval and authorization by filing on April 8, 2004 a Verified Notice of Exemption Under 49 U.S.C. §10901 (attached hereto as Exhibit "B").

construct an extension to any of its railroad lines, (2) construct an additional railroad line, (3) acquire or operate a rail line or an extended or additional railroad line, or (4) provide transportation over, by means of, an extended or additional rail line, only if the Surface Transportation Board ("STB") finds that the present or future public convenience and necessity require or permit the construction and/or acquisition, and operation, of the railroad line.

Plaintiff's brief makes many statements concerning their opinion of whether the tracks and property in question are "common carrier" lines. All of the discussion concerning whether the tracks are exempt from the STB is irrelevant, because the sole decision maker of whether railroad tracks are exempt from the jurisdiction of the STB is the STB. It is not admitted that Plaintiff's case against Mariah has any basis in fact but if the Plaintiff truly felt that it did have a good case, there is a process open to determine who might actually own the tracks and property in question. The STB has regulations under 49 U.S.C. §10502(d) that allow for Petitions to Revoke the Exemption and those Petitions may be filed at any time. Norfolk Southern Railway Co. et al. v. City of Austell, Civil Action No. 1:97-CV-1018-RLV, U.S.D.C. — Nor. Dist. GA, August 19, 1997; Burlington Northern Sante Fe Corp. vs. Anderson, 959 F. Supp. 128 (D. Mont. March 24, 1997); CSX Transportation Transp. Inc. vs. Georgia Pacific Service Com'n, 944 F. Supp. 1573 (M.D. Ga., October 28, 1996). Who would be better to make such a determination than the federal system that is responsible for all railroad transactions and deals with these questions in its normal course of business.

Plaintiff has a remedy available to them through the STB and since the STB has sole and exclusive subject matter jurisdiction this case should be dismissed with prejudice. The Plaintiff would then be free to file a Petition to Revoke the Exemption under 49 U.S.C. §10502(d). In G&P Terminal Packaging Co. v. Consolidated Rail Corp., 646 F. Supp. 511, aff'd 830 F. 2d 1230 (3rd Cir. 1987) cert denied by U.S. Ct., the Third Circuit Court of Appeals ruled that under the comprehensive scheme of federal regulation, exemption of a regulated

effect of the Interstate Commerce Act (forerunner to the STB), the sole remedy for parties aggrieved by an exempted transaction was to seek Board revocation of the exemption and full regulatory review of the transaction under applicable statutory standards and agency regulations.

Non-carriers that acquire rail lines must obtain authority under Section 10901 or an exemption there from, even if they have contracted before hand with a separate entity to provide service over that line. Genessee and Mohawk Valley RR Co. - Acquisition and Operation Exemption - Consolidated Rail Corp., Finance Docket No: 32169 (ICC Service Date September 30, 1993). In such cases, the non-operating purchaser of the line is generally subject to "residual common carrier authority" by virtue of its ownership of railroad assets. Where an operating carrier agrees to provide rail service over the rail line owned by a non-operating entity the only obligation incurred as a result of residual common carrier authority is to obtain another operator in the event the operating carrier can no longer provide service.

At no time did the Plaintiff notify the STB of their alleged interest in acquiring or operating the subject rail lines and at no time has Plaintiff sought a revocation of the exemptions issued by the Board for the acquisition and operation of these rail lines by Mariah or MVC Transportation.

Although these transactions were subject to deregulation through the exemption process, state and local authorities may not by virtue of that exemption re-regulate or govern these line sale transactions. The sole remedy for parties aggrieved by exempt transactions is to seek Board revocation of the exemption and subject the transaction to full regulatory review under the requirements of 49 C.F.R. § 1150. G&T Terminal Packaging Co. v. Consolidated Rail Corporation, 646 F. Supp.511, affd 830 F.2d 1230 (3rd Cir. 1987), cert. denied 485 U.S. 988 (1988). See also Mr. Sprout, Inc. v. U.S., 8 F.3d 118 (2d Cir. 1993) (ICC has jurisdiction

Moreover, the STB's jurisdiction over the exemption or regulation of the sale and operation of rail lines under Section 10901 is exclusive. In the Transportation Act of 1920, Congress established a comprehensive scheme of federal regulation for both entry into and departures from the railroad industry under former Section 1 (18) of the Interstate Commerce Act, the predecessor of Section 10901. In Chicago N.W. Transp. Co. vs. Kalo Brick & Tile Co., 450 U.S. 311, 101 S. Ct. 1124 (1981) the Court held that the Interstate Commerce Commission's authority over rail transactions governed by Section 1(18) was plenary and exclusive. In finding that the Interstate Commerce Act preempted state law claims, the Court reasoned that when Congress has chosen to legislate pursuant to its constitutional powers, a Court must find state law preempted by federal regulation when the state statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. at 317, 101 S.Ct. at 1131; Hines vs. Davidowitz, 312 U.S. 52, 67; 61 S.Ct. 399, 404 (1941). The Court further stated that the ICA "is among the most pervasive and comprehensive of federal regulatory schemes" and that "compliance with the intent of Congress cannot be avoided by mere artful pleading" of state laws claims "to gain the relief. denied by the Commission." 450 U.S. at 318, 324; 101 S.Ct. at 1130, 1134. Also, the Court emphasized the exclusive nature of the ICC's jurisdiction and stated that "the breadth of the Commission's statutory discretion suggest a Congressional intent to limit judicial interferences with the agency's work." Id. at 321, 101 S.Ct. at 1132. See also Deford vs. Soo Line Railroad Company, 867 F.2d 1080 (8th Cir. 1989).

For purposes of this litigation, the operative provisions of federal law are set forth in the Interstate Commerce Commission Termination Act of 1995, P.L. 104-88, 109 Stat. 803 ("ICCTA"). In ICCTA, Congress granted the power to authorize the acquisition of rail lines and to regulate railroad operations on them exclusively to the STB under Section 10901 and Section 10501 (b)(1). Under ICCTA the STB has jurisdiction over railroad transportation

(a)(2)(A). In addition, the jurisdiction of the Board over transportation by rail carriers is exclusive:

Except as otherwise provided in this part, the remedies provided under this part with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under federal or state law.

49 U.S.C. §10501(b)(1). ICCTA eliminated the former dual scheme of interstate regulation by the federal government and intrastate regulation by state governments and left the regulation of railroads solely within the jurisdiction of the STB.

The Conference Report on ICCTA states that "[a]lso integrated into the statement of general jurisdiction is the delineation of the exclusivity of federal remedies with respect to the regulation of rail transportation. H.R. Rep. No. 104-422, 104th Cong., 1st Sess. 167 (1995). An even more forceful statement is made in the report of the Committee on Transportation and Infrastructure of the House of Representatives:

Changes are made to reflect the direct and complete preemption of state economic regulation of railroads The former disclaimer regarding residual state police powers is eliminated as unnecessary, in view of the federal policy of occupying the entire field of economic regulation of the interstate rail transportation system. Although states retain the police powers reserved by the Constitution, the federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and be completely exclusive. Any other construction would undermine the uniformity of federal standards and risk the balkanization and subversion of the federal scheme of minimal regulation for this intrinsically interstate form of transportation. H.R. Rep. No. 104-311, 104th Cong., 1st Sess. 95-95 (1995). (Emphasis added)

Other aspects regarding the sale and operation of these rail lines were authorized under the Board's exemption of Mariah from the provisions of 49 U.S.C. § 11323. The Board's scope of authority under that provision is set forth in 49 U.S.C. §11321(a). It specifies that the authority of the Board under Subchapter II, which relates to rail carriers is also exclusive. Section 11321

(a) states:

A rail carrier or corporation participating in or resulting from a transaction approved by or exempted by the Board under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a state authority. A rail carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust law and from all other law, including

exercise control or franchises acquired through the transaction. (Emphasis added.)

See also Ry. Labor Executive Ass'n v. S.Pac. Transp. Co., 7 F.3d 902 (9th Cir. 1993) (ICC has exclusive authority to clarify scope of railroad mergers and corresponding breadth of exemption from Railroad Labor Act.)

In the absence of an exemption, rail line acquisition and operating transactions are subject to extensive regulatory oversight. A cursory review of the Board's regulations at 49 C.F.R. 1150 confirms that the claims made by Plaintiff and the relief sought by Plaintiff is totally encompassed within the Board's administrative regulations.

WHEREFORE, Defendant, Mariah Venture Capital & Consulting, Inc., requests this Honorable Court sustain its Preliminary Objections based upon lack of subject matter jurisdiction.

Respectfully submitted,

Robert G. Boyle, Esq.
Attorney for Defendant, PA I.D. 49482
4232 Brownsville Road, Suite 348
Pittsburgh, PA 15227-3330
(412) 884-0770

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

PROLINE RAILROAD TRACK CO.,

Plaintiff,

NO. GD 03-025297

v.

MARIAH VENTURE CAPITAL &
CONSULTING, INC.,

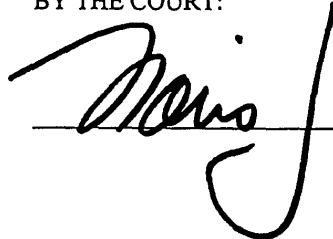
Defendant.

ORDER OF COURT

AND NOW, to wit, this 17th day of MAY, 2004, upon consideration of the record, it is hereby ORDERED, ADJUDGED AND DECREED that the Preliminary Objection of Defendant, Mariah Venture Capital & Consulting, Inc., ~~is sustained and Plaintiff's Complaint is dismissed~~

~~with prejudice.~~ *all dismissed and answer to be filed in 20 days.*

BY THE COURT:

 J.

JAM001133V001
2/18/2004

EXHIBIT C



381 West Bay St.
Suite 800, SC 3-915
Jacksonville, FL 32202
(904) 633-4501 Office
(904) 633-1393 Fax
E-Mail: Jim_Barker@csx.com

J. C. Barker
Manager Acquisitions

March 12, 2004

Mr. James Frank
MVC Transportation LLC
98 Glenbury Street
Pittsburgh, PA 15234

Re: McKees Rocks Yard Rail Facilities

Dear Mr. Frank:

The purpose of this letter is to provide you with a statement of intent on the part of CSX Transportation Inc. to pursue negotiations for purchase of MVC Transportation LLC's right, title and interest in the rail facilities it plans to acquire pursuant to STB authority in MVC Transportation, LLC - Acquisition Exemption - P&LE Properties, Inc. STB Finance Docket No. 34462.

CSX is aware that on April 22, 1997, pursuant to a Bankruptcy Court order in Re: Pittsburgh and Lake Erie Properties, Inc. Case No. 96-406 (MFW) Chapter 11, P&LE sold the McKees Rocks Yard real estate and rail facilities to Allegheny Railroad Properties, Inc. (ARC) and accepted a cognovit judgment note and mortgage secured by the McKees Rocks Yard real estate and track from ARC. However at that time, P&LE did not convey title to the McKees Rocks Yard real estate and retained ownership of the yard and the tracks therein until such time as ARC satisfied the judgment note. When ARC defaulted on its payment obligations to P&LE, the ARC note and mortgage was acquired and satisfied by Mariah Venture Capital and Consulting Company with approval of the Bankruptcy Court of Delaware by order dated June 18, 1999, and thereafter, Mariah assigned the ARC note and mortgage to MVC Transportation, LLC which, in lieu of execution and foreclosure by deed and bill of sale from P&LE, took title to the rail yard and track facilities therein subsequent to the effective date of the acquisition exemption notice in STB Docket No. 34462.

EXHIBIT D

CSX is also aware that Proline Railroad Track Company claims to have purchased certain track materials within the McKees Rocks Yard for salvage and has filed suit in the Common Pleas Court of Allegheny County against Mariah asserting title to certain track materials in McKees Rocks Yard. Proline Railroad Track Company v. Mariah Venture Capital and Consulting Inc. No. GD03-025297.

CSX has reviewed the facts pertinent to the sale and acquisition of common carrier railroad properties and agrees that the claims asserted by Proline Railroad Track Company Inc. are invalid and represent a collateral attack upon the exclusive jurisdiction of the Surface Transportation Board to regulate and control the disposition of common carrier rail facilities under the ICC Termination Act of 1995. Accordingly, CSX is prepared to proceed with negotiations to purchase the McKees Rocks Yard rail facilities from MVC Transportation, LLC and obtain Surface Transportation Board authorization to acquire the former P&LE McKees Rocks Yard rail facilities for use in connection with CSXT common carrier railroad operations.

In light of this decision, CSX desires Mariah Venture Capital and Consulting Inc. and MVC Transportation LLC to seek relief from the Surface Transportation Board as may be necessary to have the Board step in and take jurisdiction to have dismissed or resolve the pending litigation in the Common Pleas Court of Allegheny County so that CSX may negotiate the acquisition of the McKees Rocks Yard rail facilities at the earliest possible date.

Sincerely,


Jim Barker

DEC 11 1997

1700-622

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

ALLEN J. LEVIN and
LEWISTOWN CENTRAL RAILROAD
COMPANY,

Plaintiffs

vs.

SEDA-COG JOINT RAIL
AUTHORITY, ET AL.,

Defendants

No. 4:CV-97-997

Complaint Filed 08/15/97

(Judge Muir)

FILED
WILLIAMSPORT

DEC 10 1997

ORDER

December , 1997

PER JA DEPUTY CLERK

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On May 29, 1997, Plaintiffs Allen J. Levin and Lewistown Central Railroad Company commenced the present action in the Court of Common Pleas of Union County, Pennsylvania by filing a Praecipe and Writ of Summons. Named as Defendants were Seda-Cog Joint Rail Authority, Jeffrey Stover, Juniata Valley Railroad Company, Lycoming Valley Railroad Company, Nittany & Bald Eagle Railroad Company, North Shore Railroad Company and Richard D. Robey. On June 30, 1997, the Defendants removed this action to the United States District Court for the Middle District of Pennsylvania. On August 15, 1997, the Plaintiffs filed a

EXHIBIT A

complaint asserting claims for violation of the Pennsylvania Municipal Authorities Act, fraud, and a claim under the Racketeering, Influence and Corrupt Organizations Act. The Plaintiffs' complaint alleges that the Defendants entered into a conspiracy to defraud the public and to violate state and federal laws in order to acquire certain branch railroad lines which were owned by Consolidated Rail Corporation. The complaint further alleges that the Defendants did not allow private parties, including the Plaintiffs, the opportunity to acquire and operate those railroad lines.

On October 16, 1997, Defendants Juniata Valley Railroad Company, Lycoming Valley Railroad Company, Nittany & Bald Eagle Railroad Company, North Shore Railroad Company and Richard D. Robey ("Railroad Defendants") filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b) and on October 24, 1997 filed a brief in support thereof. On November 17, 1997, the Plaintiffs filed a brief in opposition. On November 26, 1997, the Railroad Defendants filed a reply brief. The motion is ripe for disposition.

From 1984 to 1996, Seda-Cog Joint Rail Authority ("Authority") acquired five railroad lines, including the Lewistown and Williamsport clusters, in central Pennsylvania from Consolidated Rail Corporation. The Railroad Defendants have operated those lines under contract with the Authority. In each case, the transactions were authorized by the Interstate Commerce

Commission or its successor agency, the Surface Transportation Board. In connection with obtaining authorization for the acquisition and operation of the Lewistown and Williamsport clusters, on August 7, 1996, the Railroad Defendants filed a notice with the Surface Transportation Board for an exemption from the provisions of 49 U.S.C. § 10901 with the Surface Transportation Board. Such an exemption would allow the Railroad Defendants to construct and operate the Lewistown and Williamsport clusters without first obtaining a certificate from the Surface Transportation Board. Pursuant to regulations issued by the Surface Transportation Board at 49 C.F.R. § 1150, which state that the exemption will be effective seven days after the notice is filed, the exemption became effective on August 15, 1996. The exemption notice stated that "if the notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. § 10502(d) may be filed at any time." The Railroad Defendants argue that the Plaintiffs never notified the Surface Transportation Board of their interest in acquiring or operating the railroad lines and did not seek a revocation of the exemptions under 49 U.S.C. § 10502.

In support of their motion to dismiss, the Railroad Defendants contend that this court does not have subject matter jurisdiction over the Plaintiffs' complaint. The Railroad Defendants contend that the Surface Transportation Board has

exclusive regulatory jurisdiction over the acquisition and operation of rail lines pursuant to 49 U.S.C. §§ 10501, 10901 and 1323. B

The Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 10501 et seq., grants the power to authorize the acquisition of rail lines and to regulate railroad operations on them to the Surface Transportation Board. The Surface Transportation Board's jurisdiction over the exemption or regulation of the sale and operation of rail lines under 49 U.S.C. § 10901 is exclusive. 49 U.S.C. § 10501(b) provides:

Except as otherwise provided in this part, the remedies provided under this part with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under federal or state law.

Courts have found that that the jurisdiction of the Surface Transportation Board preempts state and other federal statutes. *Deford vs. Soo Line Railroad Company*, 867 F.2d 1080 (8th Cir. 1989). See also *CSX Transportation Inc. vs. Georgia Public Service Commission*, 944 F.Supp. 1573 (M.D.Ga. 1996); *Burlington Northern Santa Fe Corp. vs. Anderson*, 959 F.Supp. 1288 (D.Mont. 1997); *Citizens Alliance vs. Montana Rail Link, Inc.*, 672 F.Supp. 576 (D.Mont. 1987). In *Deford*, the Eighth Circuit held that:

The ICA [Interstate Commerce Act] demonstrates Congress' intent to delegate to the ICC [now Surface Transportation Board¹] the exclusive responsibility to

¹The Interstate Commerce Commission Termination Act abolished the Interstate Commerce Commission and transferred the remaining regulatory functions over all railroad transportation

evaluate all aspects, including financial viability, of rail line transfers. The ICA provides both a forum and a set of remedies that is exclusive and completely preempts competing state law claims.

Deford, 867 F.2d at 1091.

The remedy for parties who seek to challenge an exemption, such as the one issued by the Surface Transportation Board on August 7, 1996 for the acquisition of the Lewistown and Williamsport clusters, is to apply to the Surface Transportation Board for revocation of the exemption. See 49 U.S.C. § 10502. In addition, with respect to the other rail lines sold by Consolidated Rail Corporation to the Railroad Defendants, remedies for violations are determined by the Surface Transportation Board as provided in 49 U.S.C. §§ 11701-11707 and civil and criminal penalties are governed by 49 U.S.C. §§ 11901-1908.

This court lacks subject matter jurisdiction over the claims alleged in the Plaintiffs' complaint. Pursuant to 49 U.S.C. § 10501(b), the Surface Transportation Board has exclusive jurisdiction over regulation of rail transportation including rail line transfers. See, Deford, supra.

Because we lack subject matter jurisdiction in this case, we will not address the Railroad Defendants' other grounds for dismissal.

AND, NOW, IT IS ORDERED:

to the newly created Surface Transportation Board.

1. The Railroad Defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b) (Document 26) is granted.

2. The Clerk of Court shall close this case.



MUIR, U.S. District Court

M:am

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

March 12, 1998
#D-84

No. 98-7092
ALLEN J. LEVIN, et al
Appellant

v.

SEDA-COG JOINT RAIL, et al.
(mwp 97-cv-997)

Present: Greenberg, Scirica & Cowen, Circuit Judges.

1. Appellees' Joint Motion for Summary Affirmance.
2. Brief in Support of Motion for Summary Affirmance.

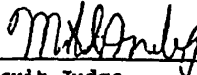
APR 1
1998


Linda A. Lang 597-1896
Case Manager

ORDER

The foregoing motion is granted. The court notes that appellant has not opposed the motion.

By the Court,


Circuit Judge

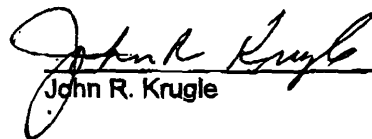
APR 24 1998
Dated: DW/cc: OCK
FJL
RLW

EXHIBIT C

UNSWORN VERIFICATION

I, John R. Krugle, on behalf of McKees Rocks Depot, Inc., verify that the statements made in the foregoing MVC Transportation, LLC's Petition for Expedited Declaratory Order are true and correct to the best of my knowledge, information and belief. I understand that any false statements made herein are subject to the penalties of 18 PA. C.S.A. §4904, relating to unsworn falsification to authorities. Further, I certify that I am qualified and authorized to file the foregoing document.

5-27-04
Date


John R. Krugle

UNSWORN VERIFICATION

I, John D. Hartman, on behalf of P&LE Properties, Inc., verify that the statements made in the foregoing MVC Transportation, LLC's Petition for Expedited Declaratory Order are true and correct to the best of my knowledge, information and belief. I understand that any false statements made herein are subject to the penalties of 18 PA. C.S.A. §4904, relating to unsworn falsification to authorities. Further, I certify that I am qualified and authorized to file the foregoing document.

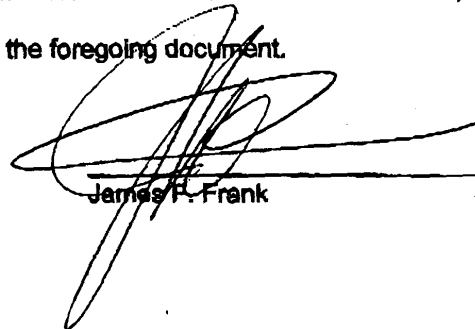
May 27, 2004
Date

John D. Hartman
John D. Hartman

UNSWORN VERIFICATION

I, James F. Frank, Manager of MVC, LLC and Mariah Venture Capital and Consulting, Inc., verify that the statements made in the foregoing MVC Transportation, LLC's Petition for Expedited Declaratory Order are true and correct to the best of my knowledge, information and belief. I understand that any false statements made herein are subject to the penalties of 18 PA. C.S.A. §4904, relating to unsworn falsification to authorities. Further, I certify that I am qualified and authorized to file the foregoing document.

5/28/04
Date


James F. Frank