

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 34462

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



**REPLY OF MVC TRANSPORTATION, LLC TO THE PETITION OF PROLINE
RAILROAD TRACK COMPANY TO REVOKE NOTICE OF EXEMPTION
AND REQUEST FOR CONSOLIDATION WITH MVC
TRANSPORTATION, LLC'S PETITION FOR EXPEDITED
DECLARATORY ORDER**

Filed on Behalf of MVC Transportation, LLC

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Office of Proceedings

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Date: July 26, 2004

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DECLARATORY ORDER**

MVC Transportation, LLC ("MVC") by its undersigned counsel files this Reply in Response to the Petition by Proline Railroad Track Company ("Proline") to Revoke the Notice of Exemption in the above captioned proceeding. MVC also requests that the Board consolidate MVC's Petition for Expedited Declaratory Order with its consideration of the Proline Petition since both matters address common issues of fact and law.

I. INTRODUCTION

On or about April 8, 2004, MVC filed with the Board a Verified Notice of Exemption under §10901 to acquire approximately 15 miles of track and rights of way located in the McKees Rocks Yard. Thereafter, on June 1, 2004 MVC filed a Petition for Expedited Declaratory Order in connection with litigation pending in the Common Pleas Court of Allegheny County in Proline Track Company v. Mariah Venture Capital and Consulting, Inc., which created a cloud on MVC's title to the McKees Rocks Yard and interfered with MVC's subsequent use and/or sale of that property for common carrier rail purposes. The Petition for Expedited Declaratory Order, previously filed with the Board is

incorporated herein by reference.¹ On June 24, 2004, Proline filed a Petition to Revoke the Notice of Exemption pursuant to 49 U.S.C. §10502(d). For the reasons hereinafter set forth, MVC respectfully requests that the Board deny Proline's Petition to Revoke and grant the relief sought in MVC's Petition for Expedited Declaratory Order. In support thereof, MVC offers the following Verified Statements.

¹ On June 24, 2004, Proline filed an untimely response to MVC's Petition for Declaratory Order asserting inter alia that (1) Proline owns the McKees Rocks Yard tracks, (2) that the track was excepted track under §10906 and (3) that the Board is barred from considering MVC's declaratory relief by the doctrine of collateral estoppel. The first two assertions are addressed in MVC's Reply to Proline's Petition to Revoke. Proline's claim that the STB consideration of MVC's Petition for Declaratory Order is barred by collateral estoppel is patently absurd where the Common Pleas Court issued no written decision other than a one line order denying Mariah's preliminary objections, rendering it impossible to know what issue the court decided. Moreover, the court's denial of Mariah's preliminary objection was not a final judgment on the merits in the state court action and is not even an appealable order under Pennsylvania Rules of Appellate Procedure.

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MVC TRANSPORTATION, LLC
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P&LE PROPERTIES, INC.

VERIFIED STATEMENT OF JAMES FRANK

My name is James Frank, I am the owner of Mariah Venture Capital and Consulting Company ("Mariah") with offices in Pittsburgh, Pennsylvania. Mariah is an investor in and developer of distressed properties and I have personal knowledge of the matters set forth in the Petition to Revoke Notice of Exemption in Finance Docket No. 34462, filed on June 24, 2004 by Proline Railroad Track Company with the Surface Transportation Board. I am authorized to make this statement on behalf of Mariah and MVC Transportation Company, LLC ("MVC") a corporate entity which I formed to acquire and own the railroad assets comprising of the former P&LE McKees Rocks Yard facilities in McKees Rocks, PA.

As indicated by Mr. Hartman's verified statement, I acquired the Allegheny Railroad Properties, Inc. ("ARP") judgment note and mortgage by bankruptcy court order dated June 18, 1999 upon the default of ARP on its note to P&LE Properties, Inc. Initially, I was unaware of the common carrier status of the McKees Rocks Yard track facilities, but when advised of that status by representatives of McKees Rocks Depot, I immediately consulted with Surface Transportation Board staff and learned that no abandonment authorization for McKees Rocks Yard had been ordered by the STB. The STB staff

advised that any acquisition of the rail facilities within the yard would require STB acquisition or exemption authorization.

It should be noted that while Mariah paid \$950,000 for the judgment note and mortgage under approval of the bankruptcy court, equitable and legal title to McKees Rocks Yard property and rail facilities remained in P&LE Properties, Inc. because ARP defaulted on its note and mortgage obligations. Moreover, common carrier rail service to the various shippers located in or adjacent to the Yard were provided by CSX Transportation, Inc. with the consent of P&LE Properties, Inc. and has never been discontinued.

After Mariah purchased the ARP note and mortgage and I became more familiar with the details and various problems associated with the McKees Rocks Yard property, it became clear to me that careful planning and coordination with numerous parties including state officials, local municipalities, Allegheny County, and various parties with facilities and/or interests in the McKees Rocks area would be required for any successful development of the rail assets. I was also aware of the fact that Proline believed that it had acquired ten +/- miles of railroad track in the McKees Rocks Yard and intended to salvage and sell that track on an internet auction.

It has taken a considerable amount of time and money to sort through the various transactions, environmental conditions, legal assertions, and regulatory issues related to McKees Rocks Yard. Nonetheless, it became evident that any successful development project for McKees Rocks Yard would require continued use of the yard for railroad purposes. As part of these efforts, I contacted CSX Transportation, Inc. ("CSXT") and learned of their plans to terminate yard operations at Glenwood Yard in Pittsburgh as part of the redevelopment of former LTV property along the Monongahela River and future

construction of the Mon Valley Expressway into Pittsburgh. CSXT representatives, of course, were familiar with the McKees Rocks Yard property and expressed guarded interest in the possible acquisition of that yard to serve its common carrier rail operations in the Pittsburgh/Allegheny County region. In addition, through other business contacts, I have developed interest on the part of other Pittsburgh industries to relocate to the McKees Rocks Yard area in order to obtain common carrier rail service in proximity to Interstate 79.

As my plans and contacts developed, in October 2003, Proline sought to sell the track material in McKees Rocks Yard. In light of those activities, Mariah advised Proline that it did not have authority to sell the McKees Rocks Yard track material and that by virtue of Mariah's acquisition of the judgment note and mortgage, no sale of that property could take place without STB regulatory clearances and the consent of Mariah. This action prompted Proline to file suite in the Common Pleas Court of Allegheny County alleging that Mariah had interfered with Proline's sale of the McKees Rocks track materials.

As discussions with CSXT progressed, it became evident that the railroad was seriously interested in acquiring McKees Rocks Yard for its rail operations in the Pittsburgh. Accordingly, I formed MVC Transportation, LLC as a corporate entity for the purpose of acquiring the McKees Rocks Yard common carrier rail facilities from P&LE Properties, Inc. in anticipation of the sale of those assets to CSXT or another railroad. Mariah subsequently assigned its interest in the note and mortgage to MVC Transportation and in lieu of execution and foreclosure, P&LE Properties, Inc. agreed to convey all its right, title and interest in the rail yard facilities by deed and bill of sale to MVC subsequent to the effective date of the STB's acquisition exemption in Finance Docket No. 34462.

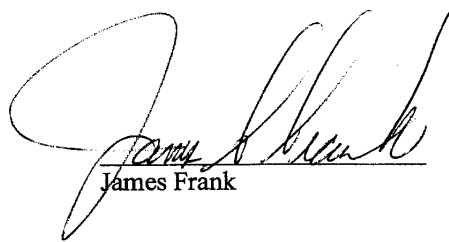
Thereafter, the Allegheny County Court of Common Pleas refused to dismiss the Proline Track Company suit or to recognize the exclusive subject matter jurisdiction of the Surface Transportation Board in connection with the issue of whether McKees Rocks Yard constituted excepted track or regulated common carrier track. In order to address that development, and the cloud which the Proline litigation created on MVC's title to the McKees Rocks Yard, MVC filed a Petition for Expedited Declaratory Order with the Board on June 1, 2004. MVC seeks a ruling from the Board that McKees Rocks Yard rail facilities remain subject to a common carrier rail service obligation and that the tracks purportedly acquired by ARP without STB acquisition or abandonment authorization could not legally be sold for salvage to Proline and that any such sale was void and illegal.

I should also point out that these facts were set out in summary fashion in footnote 1 of the Notice of Exemption filed on behalf MVC on April 8, 2004. I also advised the STB staff of these issues in the course of my investigation regarding the common carrier status of the Yard. Contrary to the assertions set forth in Proline's Petition to Revoke, MVC has presented the Board with no false or misleading facts regarding the ownership of the yard. Proline's claims were fully disclosed to the Board. MVC has not used the STB acquisition exemption proceeding as a convenient means of "forum shopping". Rather, MVC has sought to comply with federal railroad transportation law in order to preserve the McKees Rocks Yard rail facilities for common carrier rail service and to develop that facility as a rail yard for CSXT or another railroad. Rather it is Proline which is desperately seeking to retain its claim to the McKees Rocks Yard track material so that it can scrap and sell those materials without regard to the public interest in preserving continued common carrier rail service.

VERIFICATION

I, James Frank, verify under penalty of perjury state that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file the foregoing Verified Statement.

Executed on 7-20, 2004.


James Frank

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 34462

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

VERIFIED STATEMENT OF JOHN L. HARTMAN

My name is John Hartman, I am the manager of P&LE Properties, Inc. and was charged with the administration, management, and sale of P&LE Properties' assets under the supervision of the bankruptcy trustee and bankruptcy court in In Re: P&LE Properties, Inc., Bankruptcy Court Docket No. 96-407. I am familiar with the events and circumstances surrounding the various transactions addressed in the Petition to Revoke Notice of Exemption filed on behalf of Proline Railroad Track Company.

On April 22, 1997, pursuant to a bankruptcy court order in In Re: Pittsburgh & Lake Erie Properties, Inc., Case No. 96-407 (MFW) Chapter 11, P&LE Properties sold the McKees Rocks Yard property and rail facilities thereon to Allegheny Railroad Properties, Inc. ("ARP") and accepted a cognovite judgment note and mortgage on the McKees Rocks Yard property from ARP in payment. Attached as Exhibit A is an aerial composite photo of McKees Rocks Yard available on the USGS Terraserver web site. ARP was a corporation formed by Mr. Ron Hall who represented himself as an expert in the management and disposition of rail properties. However, P&LE Properties never transferred title to the McKees Rocks Yard property to ARP because almost from the onset, difficulties ensued between Mr. Hall and P&LE Properties, Inc. regarding his failure to

undertake various actions including obtaining regulatory approvals for his purchases of P&LE assets, and his failure to comply with payment obligations under the terms of the judgment note and mortgage. Mr. Hall was to manage, lease and/or sell various parcels and buildings in or adjacent to McKees Rocks Yard and receive partial release of the mortgage upon payment of one-half of the proceeds from those transactions to the bankruptcy estate.

However, the ARP transaction did not result in any payments to the estate by Mr. Hall. On May 1, 1997, Mr. Hall purportedly sold “track material, rail, switches and ties,” to Kovalchik Corporation as evidenced by a bill of sale signed by Mr. Hall for \$150,000 but the P&LE Properties estate never obtained any payment from that transaction and no regulatory applications for that transaction were filed by Mr. Hall. One year later, on April 21, 1998, Kovalchik Corporation sold “10.5 +/-miles of railroad track and trackage including railroad ties, switches, tie plates and related material... including all railroad trackage purchased by Kovalchik from ARP” to Proline Services, Inc as evidenced by an asset purchase agreement signed by Christian Farls of Proline for \$325,000. This agreement also purportedly sold “5 +/- miles of railroad track and trackage including railroad ties, switches, tie plates and related material located predominantly in Stow Township and partially in McKees Rocks on the former P&LE rail yard site” to A&K Railroad Materials, Inc.

Despite these transactions, P&LE Properties, Inc. never received any payment from ARP or Mr. Hall or Kovalchik Corporation and none of these parties obtained STB abandonment authority prior to the sale of the track materials which comprised McKees Rocks Yard. Moreover, P&LE Properties, Inc. never sought STB abandonment authority nor did the bankruptcy court seek an advisory ruling from the STB in connection with any

abandonment determination under 11 U.S.C. §1170. Mr. Hall apparently assumed that McKees Rocks Yard was not subject to common carrier obligations and never bothered to confirm his assumption with the STB.

As the Board is aware, the bulk of P&LE assets were sold pursuant to STB approval in Three Rivers Railway Company- Acquisition and Operation Exemption – The Pittsburgh & Lake Erie Railroad Company, in Finance Docket 32055 (September 29, 1992). With respect to McKeesRocks Yard, Three Rivers Railway Company, a wholly owned subsidiary of CSX Transportation, Inc. acquired an operating easement for mainline trackage through the middle of McKees Rocks Yard. This trackage also provided access to the remaining rail facilities in McKees Rocks Yard which CSXT, at that time, did not need for its railroad operations. Nonetheless, CSXT provided and continues to provide common carrier rail service to shippers, such as Clifton Steel Company, Brian Cement, Castriota Metals Recycling, Inc. and McKees Rocks Depot at the McKees Rocks Yard. In addition, CSXT provided rail service to Trinity Industries which leased a significant portion of the McKees Rocks Yard track for its private car leasing and repair activities. Throughout its bankruptcy administration, P&LE Properties was the owner of McKees Rocks Yard tracks used by shippers within or adjacent to McKees Rocks Yard to access common carrier rail service provided by CSXT.

I have subsequently learned that the practices that I encountered with Mr. Hall both at McKees Rocks Yard and in connection with another transaction involving the former Youngstown and Southern Railroad Company with which the STB is very familiar, were part of Mr. Hall's standard operating procedure for the acquisition and sale of railroad lines. Mr. Hall would find a distressed railroad situation, form a corporation and make an offer to purchase railroad assets offering a small downpayment and a significant judgment

note. He would then immediately "flip" the track to various salvage companies for a larger cash payment which was then apparently used for business purposes or diverted to personal use without honoring his initial obligation to the selling company. He would then sell the stock of his purchasing corporation to third parties and leave the problems he created and the obligations on which he defaulted for others to resolve.

After ARP defaulted on its payment obligations to P&LE Properties, Inc. and it became evident that ARP was not going to cure its default, the ARP note and mortgage, with approval of the U.S. Bankruptcy Court by order dated June 18, 1999, was purchased by Mariah Venture Capital and Consulting Company for \$950,000. P&LE Properties made a direct payment of 75% of the sale proceeds to State Street Bank in satisfaction of preexisting debtor obligations. Subsequently, Mariah assigned the ARP note and mortgage to MVC Transportation and in lieu of execution and foreclosure, P&LE Properties, Inc. transferred all its right, title and interest to the McKees Rocks Yard common carrier rail facilities by deed and bill of sale subsequent to the effective date of the STB's acquisition approval in Finance Docket No. 34462.

VERIFICATION

I, John Hartman, verify under penalty of perjury state that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file the foregoing Verified Statement.

Executed on July 16, 2004.


John Hartman



Before the Surface Transportation Board

STB Finance Docket No. 34462

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

VERIFIED STATEMENT OF JOHN R. KRUGLE

My name is John R. Krugle, I am the owner of McKees Rocks Depot which is located adjacent to the McKees Rocks Yard in McKees Rocks, PA. McKees Rocks Depot is in the car repair and car salvage business. In October, 2003, I learned of a proposed auction of track material in McKees Rocks Yard from Mr. Chris Farls of Proline Railroad Track Company. Among the track which Proline proposed to sell was track which connected our repair and salvage facilities in McKees Rocks Yard with the CSXT main line. The sale and salvage of that track would have eliminated my ability to obtain common carrier rail service from CSXT. I immediately retained the services of a rail transportation attorney who advised the parties that the rail facilities within McKees Rocks Yard had not been abandoned and that those tracks remain part of a federally regulated interstate common carrier rail system which I relied on for common carrier service. See Exhibit A.

I have been located in the McKees Rocks Yard property for over 10 years and the availability of common carrier rail service from CSXT is essential to my business operations. I have personal knowledge regarding the common carrier rail service which CSXT presently provides to shippers located in and adjacent to the P&LE's former

McKees Rocks Yard. At the present time, CSXT operates its main line directly through the center of the McKees Rocks Yard rail facilities. In addition, CSXT sets off and picks up cars on several adjacent tracks located within its right of way. Shippers within the yard obtain their cars or set out their cars on the CSX tracks using a locomotive crane or track mobile. CXST will also provide yard switching for a service charge on request.

The Yard consists of a substantial number of switches, lead tracks, classification tracks and sidings which are interconnected and are presently utilized to set out and pick up interstate rail shipments for various shippers located at the Yard. These shippers include: Clifton Steel Company, Castriota Metals Recycling, Inc., and McKees Rocks Depot. In addition, Trinity Industries also received and tendered cars to and from its car repair and car leasing operations before leaving McKees Rocks Yard. CSXT also connects with the Pittsburgh, Allegheny, and McKees Rocks Railroad in McKees Rocks Yard to interchange traffic to and from the shippers served by that railroad in the M.R.I.E. Industrial Park which is adjacent to the McKees Rocks Yard.

As indicated on the aerial photographs attached to Mr. Harman's verified statement, McKees Rocks is a fairly extensive yard facility. When operated by the Pittsburgh & Lake Erie Railroad Company, it included car shops, repair facilities, switching and classification tracks, engine and locomotive shops, and a number of maintenance and support facilities utilized by P&LE in connection with its common carrier rail operations. Thus there are a variety of track configurations, weights of rail, and trackage alignments within the yard. Many of these facilities are connected with lead track and switches and most of the yard facilities are accessible for rail service including the facilities of the various shippers noted above. Some of the track configurations are not stub end tracks but are connected through switches and lead tracks making it possible to operate in and through the yard without doubling back over the same railroad track.

CSXT presently serves industries within the McKees Rocks Yard by setting off and picking up cars on its tracks adjacent to its main line and CSXT has numerous trains which operate on a daily basis over its main line track through the center of the yard. Moreover, when CSXT acquired the assets of the former Pittsburgh & Lake Erie Railroad Company, it adopted McKees Rocks, PA as a station on CSXT.

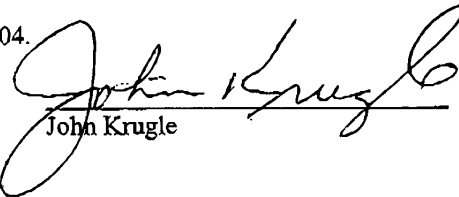
While the level of rail service provided may vary from time to time, we have always had access to CSXT and in some instances to the Pittsburgh & Ohio Central Railroad via the tracks which comprise the McKees Rocks Yard.

Moreover, I have never been served with any notices of abandonment from either P&LE Properties, Inc. or from any other party claiming an interest in those tracks. Accordingly, I was quite surprised and concerned when last October I learned of the attempt by Proline to sell the tracks and rail lines over which I receive rail service from CSXT. Accordingly, I request that the Surface Transportation Board preserve and protect McKees Rocks Depot's access to CSXT and the tracks which we utilize in connection with our business in the McKees Rocks Yard.

VERIFICATION

I, John Krugle, verify under penalty of perjury state that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file the foregoing Verified Statement.

Executed on 7-26, 2004.


John Krugle

II. LEGAL ARGUMENT

A. McKees Rocks Yard is not excepted track.

A notice of exemption that contains false and/or misleading information is void ab initio under 49 C.F.R. 1150.32(c) and otherwise may be revoked, in whole or in part, under 49 U.S.C. §10502(d), if the Board finds regulation necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. §10101. When, as here, an exemption has become effective, a revocation request is treated as a Petition to Reopen and Revoke, and, under 49 C.F.R. 1115.3(b), it must specify whether there is material error, new evidence, or substantially changed circumstances. The party seeking revocation must articulate reasonable specific concerns to demonstrate reconsideration is warranted and that regulation of the underlying acquisition transaction is necessary. See CSX Transportation, Inc. – Abandonment – In Randolph County, WV., 9 ICC 2d 447, 449 (1992); and I&M Rail Link, LLC – Acquisition and Operation Exemption – Certain Lines of Soo Line Railroad Company d/b/a Canadian Pacific Railway, STB Finance Docket No. 33326 et al. (STB served April 2, 1997) aff'd sub nom. City of Ottumwa v. STB, 153 F 3d 879 (8th Cir. 1998). When revocation is sought, the STB's inquiry is similar to the one used to determine if an exemption is appropriate; it focuses on the RTP sections related to the underlying statutory sections from which the exemption was sought. See Missouri PAC. R.Co. – Aban. Exempt. – Counties in Oklahoma, 9 ICC 2d 18, 25.

The Proline Petition to Revoke contains an extensive discussion of the various transactional documents under which Proline and MVC acquired their respective interests in the McKees Rocks Yard rail facilities. However, Proline's arguments and contentions regarding these documents are largely irrelevant because the alleged series of transactions

by which Proline claims ownership of the McKees Rocks Yard track materials for purposes of salvage and sale was not preceded by STB or bankruptcy court abandonment authorization. Proline asserts that no such authorization was required because the rail assets within McKees Rocks Yard were excepted track under 49 U.S.C. §10906

Under 49 U.S.C. §10906, the STB does not have authority over the construction, acquisition, operation, abandonment or discontinuance of spur, industrial, team, switching or side tracks. Whether a track segment is excepted from STB abandonment authority by §10906 or, alternatively, fully subject to the rail licensing and abandonment provisions of the statute is determined by examining the intended use of the track. Texas and Pac. Ry. v. Gulf, Colo. and S.F. Ry., 270 U.S. 266, 278 (1926). There is no single test as to what constitutes excepted track under 49 U.S.C. §10906. The STB analysis focuses on the disputed track's use, history, and physical characteristics and the Board relies on a variety of indicia, 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 (i.e.g., loading, unloading, switching); and whether there are stations on the track. See CNW-Abandonment Exemption – In Henry County, Illinois, 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).

As indicated by the verified statements of Mr. Hartman and Mr. Krugle, the use, history, and physical characteristics of the track facilities within McKees Rocks Yard confirm that it is not excepted track under 49 U.S.C. §10906. In this regard, it is important

to note that the filing by Proline contains no direct testimony regarding these factors. First, as indicated by Mr. Hartman and Mr. Krugle, the tracks within McKees Rocks Yard have been and are currently being used to provide origination and termination switching for interstate common carrier rail service for various shippers located in and adjacent to McKees Rocks Yard. Moreover, there are over 10 miles of track within this yard facility and that track is not in all cases stub ended but is connected by switches and lead tracks which in turn connect to CSXT's main line tracks. McKees Rocks Yard was not built to invade the territory of another railroad, but the rail facilities within the Yard do provide tracks which connect with the Pittsburgh & Ohio Central Railroad ("P&OC") and the Pittsburgh, Allegheny and McKees Rocks Railroad. ("PAM"). PAM is a small switching line located within the M.R.I.E. Industrial Park which is immediately adjacent to the McKees Rocks Yard. PAM also interchanges with the P&OC. CSXT serves the McKees Rocks Yard through its main line on a daily basis and handles both inbound and outbound traffic for the various shippers located within and adjacent to the McKees Rocks Yard as well as its interchange operations with PAM. Throughout the P&LE Properties' bankruptcy administration, it continued to own and lease portions of McKees Rocks Yard to various shippers who, to the extent necessary, assumed maintenance responsibility for yard tracks utilized to serve their respective plant facilities. Given the financial condition of P&LE Properties, track conditions within McKees Rocks Yard have deteriorated over the last ten years but many yard tracks are still serviceable for railroad purposes. Thus the evidence of record presented by MVC clearly demonstrates that McKees Rocks Yard track facilities, viewed as a whole, and in light of the history and use of that track during the P&LE Properties bankruptcy and its subsequent sale to MVC for continued railroad

purposes, falls within the scope of the STB's abandonment jurisdiction under the provisions of 49 U.S.C. §10903.

b. Proline's purported purchase of McKees Rocks Yard track material for salvage and sale is illegal and void.

In view of the foregoing facts, the claim by Proline that McKees Rocks Yard is excepted track simply has no merit. In order for Proline to prevail, it must demonstrate that it acquired the McKees Rocks Yard track materials under a legally enforceable agreement of sale. In this proceeding, Proline insists that it acquired the McKees Rocks Yard track material from Kovalchik Corporation who in turn acquired it from ARP. However, neither P&LE Properties, Inc. nor ARP nor Kovalchik Corporation nor Proline obtained abandonment authority from the STB prior to the sale of track material. It is well settled that without STB abandonment authority a state or local order, regulation or civil enforcement action that would sever a line of railroad or prevent operations over it is precluded. Union Pacific Railway Company Petition for Declaratory Order, STB Finance Docket No. 34090, Service Date November 9, 2001. See also 49 U.S.C. §10501(d), 10903. An attempt to acquire a common carrier railroad line or facility without appropriate STB abandonment authority and to salvage and sell the track material or other rail assets comprising that line so as to preclude its use for railroad purposes is illegal and agreements to accomplish that purpose are void. Railroad Ventures, Inc. – Abandonment Exemption – Between Youngstown, OH and Darlington, PA, STB Docket No. AB-556 (Sub. No. 2X) Service Date October 2, 2000. Congress gave the STB exclusive and plenary authority over rail line abandonments and Board authority is required before a rail line can be lawfully abandoned and liquidated. Chicago and Northwestern Transportation Co. v. Kalo Brick and Tile Company, 450 U.S. 311, 319-21 (1981); Philips Co. v. Denver and Rio

Grande Western Railroad, 97 F 3d 1375 (10th Cir. 1996), cert. denied, 521 U.S. 1104 (1997). The courts have been clear that “absent... valid... abandonment [authority]... a state may not require railroad to cease operations over a right of way.” National Wildlife Federation v. ICC, 850 F 2d 694, 704 (D.C. Cir. 1988) citing New Orleans Terminal Co. v. Spencer, 366 F 2d 160 (5th Cir. 1966). Thus, any party seeking the abandonment of a line of railroad or discontinuance of rail service must first obtain appropriate authority from the Board. Consolidated Rail Corporation v. ICC, 29 F 3d 706 (D.C. Cir. 1994).

In light of these statutory and case authorities, ARP’s failure to obtain SBT abandonment authorization for McKees Rocks Yard is fatal to Proline’s ownership claims. Moreover, Proline’s attempt to utilize the Common Pleas Court of Allegheny County to prevent the conveyance and sale by P&LE Properties of the McKees Rocks yard rail facilities to MVC is precluded and preempted by 49 U.S.C. §10501(b).

The private agreements which existed between P&LE Properties, Inc. and ARP or any agreements between ARP and successive purchasers have no bearing on the jurisdiction of the ICC with respect to these transactions. In Thompson v. Texas Mexican R. Co., 328 U.S. 134, 147 (1946), the U.S. Supreme Court found that a contract, whether expired by its term or terminated by operation of an escape clause, could not effect the ICC’s power. The Court went on to state that “until abandonment is authorized, operations must continue”. Thus, in the absence of STB abandonment authorization, the McKees Rocks Yard remains subject to exclusive STB jurisdiction and the rail operations currently being provided to various shippers by CSXT must continue. Given the absence of any abandonment authorization, Proline may have claims against the scrap dealer with whom they dealt, but Proline has presented no grounds for revocation of MVC’s acquisition exemption and no basis for its ownership of track materials in the Yard.

c. Section 10906 is inapplicable to MVC's acquisition of McKees Rocks Yard rail facilities.

As noted above, the Board has long held that the proposed use of the track determines whether the acquisition and/or operation of a track requires prior approval under 49 U.S.C §10901 or abandonment authorization under 49 U.S.C. §10903. Moreover, focus on use may not obscure the larger purpose and effect of the proposed transaction. Here, MVC sought STB acquisition authority in order to acquire the McKees Rocks Yard for the purpose of continued common carrier rail service currently provided to shippers by CSXT. Proline has not sustained its burden to demonstrate that MVC did not intend to acquire the McKees Rocks Yard for such a purpose. The STB has ruled that the exception provided in §10906 does not apply when a non-carrier such as MVC acquires title to a railroad track for the purpose of becoming a rail carrier. See Effingham Railroad Company – Petition for Declaratory Order – Construction at Effingham, IL., STB Docket No. 41986 (STB served September 12, 1997), reconsideration denied (STB served September 18, 1998), *aff'd sub. nom United Transportation Union v. STB*, 183 F 3d 606 (7th Cir. 1999). This is precisely why Mr. Frank formed MVC as a separate corporation from Mariah in order to separate Mariah from the various statutory obligations and liabilities which are unique to common carrier railroads and to facilitate development of new rail services at McKees Rocks Yard. Moreover, even if Section 10906 were applicable to the tracks in McKees Rocks Yard, the STB has found that in these circumstances excepted track operations may be converted to fully regulated common carrier service. Arkansas Central Railway Co., Inc. – Operation Exemption – Line of Herzog Stone Products, Inc., Finance Docket No. 31405 (ICC served May 31, 1989); Yolo Shortline Railroad Company – Acquisition and Operation Exemption – County of Sacramento, CA, STB Finance Docket

No. 34018 (STB served Mar. 27, 2001); and Texas Central Business Corporation – Operation Exemption – MidTexas International Center, STB Finance Docket No. 33997 (STB served Sept. 20, 2002).

d. Past and present use of certain McKees Rocks Yard track for common carrier interstate rail service precludes the sale of all yard tracks for non-railroad purposes.

Proline's Petition for Revocation provides no evidence regarding current utilization of the McKees Rocks Yard tracks for common carrier rail service. As noted by MVC's Verified Statement, throughout the administration of the P&LE bankruptcy proceeding, P&LE Properties leased industrial sites in McKees Rocks Yard to various shippers who obtained common carrier rail service for their plant facilities from CSXT.² As indicated by the photographic exhibit attached to Mr. Hartman's verified statement, there are a multiplicity of tracks, sidings, connecting tracks and industrial leads which form a complex network of rail facilities within McKees Rocks Yard which are used for the interchange of cars and movement of shipments to and from railroad shippers in interstate commerce. Most importantly, this network of yard tracks is operated not as individual sidings or spur lines but as an integrated rail transportation facility. In Meyers v. J Street Connecting Railroad Company, 288 F 2d 356 (2d Cir. 1961), the court noted that a substantial part of the defendants railway track consisted of spur, industrial, team, switching or side tracks, which if abandoned as individual tracks might fall outside the authority of the ICC. However, the court also noted that the railroad application included tracks the abandonment of which was clearly within the ICC's abandonment authority. Since the abandonment application

² Moreover, even if rail service within portions of the McKees Rocks Yard during the administration of the P&LE bankruptcy estate were suspended or terminated for a period of time, reactivation of rail service over a rail line that has not been abandoned does not require Board approval. Lees Summit, MO v. STB, 231 F 3d 39, 42-43 at N. 3 (D.C. Cir. 2000); Detroit/Wayne County Port Authority v. ICC, 59 F 3d 1314, 1316-17 (D.C. Cir. 1995); Union Pacific Railroad Co. – Petition for Declaratory Order – Rehabilitation of Missouri – Kansas- Texas Railroad Between Jude and Augdon Junction, TX, STB Finance Docket No. 3361 (STB served August 21, 1998).

also included main tracks and tracks that provided interstate service to various shippers, none of the tracks could be abandoned without the commission's certificate. At McKees Rocks Yard, there are tracks that individually might be subject to Section 10906, but there are also other tracks used to provide interstate service to multiple shippers. Thus all McKees Rocks Yard rail facilities are subject to STB jurisdiction under Section 10901 and 10903 and can not be liquidated for non-rail purposes. See also Railway Labor Executive Association v. City of Galveston, 849 F 2d 145 (Cir. 1988).

e. Proline's ownership claims also fail under Pennsylvania law.

In its Petition for Revocation, Proline makes extended legal arguments which attempt to ignore the jurisdiction of the STB and the fact that the original purchaser from whom Proline claims title to the track materials did not obtain STB acquisition or abandonment authorization. As MVC has previously noted to the Board in its Petition for Expedited Declaratory Order, P&LE Properties retained a security interest in the track materials located within McKees Rocks Yard under the assembled industrial plant doctrine, also known as the integrated economic unit doctrine. Under Pennsylvania law, this doctrine treated certain fixtures and movables as real estate for certain purposes. The doctrine arose out of mortgage law where a lender taking a mortgage as security for a loan from an industrial plant, (e.g. a steel mill) claimed that the lien of the mortgage extended to the machinery and equipment necessary or useful in the operation of the land as an industrial plant even though not specifically mentioned in the descriptive clause of the mortgage. First National Bank of Mount Carmel v. Reichneder, 371 Pa 463, 496, 91 A2d 277, 279-280 (1952). Where this claim was successful, the purchaser at the lender's foreclosure sale would acquire title to the land, buildings, and equipment. Under this doctrine, all machinery and equipment necessary for the operation of an industrial or

commercial enterprise, such as a railroad switching yard, and placed on the enterprise's land for permanent use by the enterprise became part of the real estate and subject to the lien of a mortgage on the plant even though some of the items were not "permanently attached" to the real estate. The purpose of the doctrine was to allow the mortgagee or the purchaser at the mortgagee's foreclosure sale to take possession of an operable enterprise, not just of the land and buildings. If the lien of the mortgage did not extend beyond the land, to fixtures that were regarded as part of the real estate, the secured party could be left with property that was not useful for its intended purpose. For an explanation of the need for the doctrine in Pennsylvania and its development see *Fairfax Leary, Jr. Financing New Machinery for Mortgaged Pennsylvania Industrial Plants*, 4 Vill. L. Rev. 498 (1959). Originally created by the Pennsylvania Supreme Court in Voorhis v. Freeman 2 Watts and Sarg., 116 (Pa. 1841) the doctrine has been applied in many cases. See 12 Pa. C.S.A. §9801 Covenant 2001.

As later developments created simpler ways to grant a non-possessory lien in chattels the rationale for the doctrine began to disappear. Finally, on June 8, 2001 the Pennsylvania legislature passed 12 Pa.C.S.A. §9801 which abolished the assembled industrial plant doctrine in Pennsylvania. However, §9801 does not apply to actions or proceedings commenced before the effective date of the section and does not effect a mortgage or other security interest entered into before the effective date of that section. Thus, the doctrine was the law of Pennsylvania in 1997 and is applicable to the 1997 ARP note and mortgage. In this case, the doctrine continues to serve the purpose for which it was originally created, i.e. to preserve the McKees Rocks Yard as viable and useful interstate railroad yard facility by ensuring that the railroad track, ties and ballast associated with the real estate remain available to be used for an integrated railroad yard.

Thus, when Mariah acquired the ARP note and mortgage with approval of the bankruptcy court and satisfied the obligation with respect to the real property assets secured by the note and mortgage, that satisfaction only released parcels of real estate from the lien of the mortgage. Mariah retained its security interest in the track materials and related common carrier rail easements to which that real estate was subject. Thus, the common carrier obligation and the necessary legal title in the track materials and related easements to discharge that obligation remained with P&LE Properties until title to those assets were conveyed by P&LE Properties to MVC Transportation, Inc. See Illinois Central Railroad Company – Abandonment Exemption – In St. Tammany Parish, LA., Docket No. AB-43 (Sub. No. 145X) (June 17, 1992).

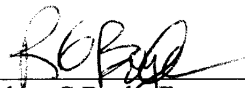
III. CONCLUSION

The McKees Rocks Yard was operated by the Pittsburgh & Lake Erie Railroad and as an integral part of its common carrier railroad facilities. When P&LE sold most of its rail facilities to Three Rivers Railroad, a subsidiary of CSX Transportation, Inc., it retained the property and rail facilities located in McKees Rocks Yard and leased portions of those facilities to various shippers who continue to receive common carrier rail service from CSXT utilizing various tracks within McKees Rocks Yard. Common carrier rail service continued to be provided by CSXT throughout the 1990s and has continued with the acquisition of the McKees Rocks Yard facilities by MVC. Notwithstanding the various transactions by which Proline acquired its purported interest in track materials within McKees Rocks Yard, it is evident that Proline and its predecessors through ignorance or evasion failed to comply with the provisions of the ICC Termination Act which are intended to ensure STB oversight of the acquisition or abandonment of common carrier rail facilities. Nor is Proline without recourse in this situation. It is free to pursue whatever

remedies are available from the parties it paid for track materials. Those remedies are available in the courts but they do involve the interruption or cessation of common carrier rail service within McKees Rocks Yard. McKees Rocks Yard was and remains a common carrier railroad facility subject to the exclusive jurisdiction of the Surface Transportation Board and the statutory obligation that this rail facility serve the public convenience and necessity.

Accordingly, MVC respectfully requests that Proline's Petition to Revoke be denied and that the relief sought by MVC in its Petition for Expedited Declaratory Order be granted. MVC also requests that the Board find that the agreements of sale upon which Proline bases ownership claims to McKees Rocks Yard track material are illegal and void.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing
Petition for Expedited Declaratory Order was served this 26th day of July, 2004, by first
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