

BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 36566

**MACQUARIE INFRASTRUCTURE PARTNERS V GP, LLC —ACQUISITION OF
CONTROL EXEMPTION— GRENADA RAILROAD, LLC AND FLORIDA, GULF &
ATLANTIC RAILROAD, LLC**

**VERIFIED PETITION OF INTERNATIONAL RAIL PARTNERS, LLC TO REJECT
NOTICE OF EXEMPTION OR, IN THE ALTERNATIVE, FOR STAY OF
EFFECTIVENESS**

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Dated: December 17, 2021

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International Rail Partners, LLC (“IRP”) respectfully petitions the Surface Transportation Board (the “Board”) to reject the Verified Notice of Exemption (the “Notice”) filed in this proceeding on November 24, 2021, by the Macquarie Infrastructure Partners V GP, LLC (“MIP GP”) before it becomes effective because the Notice contains misleading information, is otherwise defective, and is not appropriate for the class exemption process. In the alternative, IRP asks the Board to stay the effectiveness of the Notice until the pending litigation in the Delaware Court of Chancery (“Court”) between Plaintiff IRP and Defendants RailUSA, LLC (“RailUSA”), American Rail Partners, LLC (“ARP”), and Newco SBS Holdings, LLC (“Newco”), regarding the validity of the acquisition in this proceeding, is finally ruled upon by the Court.

I. BACKGROUND

A. The MIP GP Verified Notice of Exemption.

As noted, MIP GP submitted its Notice pursuant to 49 C.F.R. § 1180.2(d)(2) on November 24, 2021, to the Board for the benefit of MIP Infrastructure Partners V fund vehicle (“MIP V”) and MIP V Rail, LLC (“MIP Rail”) to acquire control of two common carrier freight railroads that

are currently owned by RailUSA: Grenada Railroad, LLC (“GRYR”) and Florida, Gulf & Atlantic Railroad, LLC (“FGA”). The Notice provided that neither MIP Rail, MIP V, MIP GP, nor any of their affiliates currently owns or controls any United States rail carrier. It also set forth that GRYR and FGA do not connect with one another today, and the transaction is not part of a series of anticipated transactions that would connect GRYR and FGA with one another or with any other railroad owned or controlled by MIP Rail, MIP V, MIP GP, or any other member of their corporate family. In addition, the Notice provides that because MIP Rail is wholly owned by MIP V, which is controlled by MIP GP, MIP GP may be deemed to (indirectly) control GRYR and FGA for purposes of 49 U.S.C. § 11323. No Class I carrier is involved in the transaction. Accordingly, MIP GP filed its Notice under Section 1180.2(d)(2) of the Board’s regulations.

On November 23, 2021, MIP Rail, ARP, and RailUSA entered into a Purchase Agreement, attached to the Notice, pursuant to which MIP Rail will acquire 100% of the equity interests of RailUSA. Upon consummation of the transaction contemplated by the Purchase Agreement, MIP Rail, a noncarrier, would control RailUSA and its two common carrier railroad subsidiaries, GRYR and FGA. GRYR, a Class III carrier, operates a 228-mile rail line in Mississippi pursuant to a lease with the North Central Mississippi Regional Railroad Authority. FGA, a Class III carrier, owns and operates 430 miles of track (including a 373-mile main line) in Florida and Georgia.¹

MIP Rail, a Delaware limited liability company, is wholly owned (indirectly) by MIP V. MIP V is an Americas-focused \$6.9 billion infrastructure fund that is controlled by its general partner, MIP GP, a Delaware limited liability company.

¹ FGA acquired CSXT’s former Panhandle Line in 2018. See *Florida Gulf & Atlantic Railroad, LLC—Acquisition and Operation Exemption with Interchange Commitment—CSX Transportation, Inc.*, FD 36247 (STB served Dec. 21, 2018); *RailUSA, LLC and American Rail Partners, LLC—Continuance in Control Exemption—Florida Gulf & Atlantic Railroad, LLC*, STB Finance Docket No. 36248 (STB served Dec. 21, 2018).

MIP GP stated that the parties intend to consummate the proposed acquisition transaction as soon as practicable after the effective date of this Notice and the satisfaction of all other conditions precedent to closing set forth in the Purchase Agreement.

MIP Rail was selected by ARP, which wholly owns RailUSA, from a number of interested purchasers in a competitive bidding process despite not being the highest bidder. Another infrastructure fund that was working with IRP to acquire control of these unique and valuable railroads was the high bidder. Despite this high bid, ARP decided to choose MIP Rail in breach of its settlement agreement with IRP arising from earlier litigation. This breach led to the related litigation now pending in the Delaware Court of Chancery that was filed on November 24, 2021, when IRP learned of this breach.

B. The Litigation in the Delaware Court of Chancery between IRP and RailUSA, ARP and Newco.

As noted, IRP filed its Verified Complaint (“Complaint”) on November 24, 2021, against RailUSA, ARP, and Newco (collectively, “Defendants”). The Complaint pleads that these Defendants breached a settlement agreement regarding earlier litigation (two cases) also involving Defendants’ right to sell GRYR and FGA. The Court had maintained jurisdiction of these cases to monitor future actions between the parties.

Defendants are controlling majority unit holders and Plaintiff is a minority unit holder, in ARP, a special purpose Delaware LLC that owns railroads. The relevant LLC Agreement required appointment of independent directors to the board of managers. The Defendants refused. The Defendants then attempted to sell the railroads without independent director oversight and without disclosures to the directors appointed by the minority member, in the sale process. IRP sued to force appointment of independent directors and to enjoin the sale in these earlier cases before the Court. This resulted in a settlement agreement on October 13, 2021, between the parties that

protected IRP's interest in the railroads against the Defendants and guaranteed its ability to be the purchaser of the railroads if it wished to do so.

Pursuant to the settlement agreement, a competitive bidding process began in November that resulted in the purchase agreement between MIP Rail, RailUSA, and ARP, attached to the Notice. Defendants initially obeyed the terms of the settlement agreement during this process, and IRP placed three bids that topped its competitors. However, on November 19, ARP informed IRP that its bid was not "workable" and asked for a revised bid. IRP submitted the revised bid on November 22. Two days later, on November 24, ARP informed IRP that it had entered into a purchase agreement with another buyer, and IRP filed suit that same day. IRP filed its complaint and simultaneously sought a temporary restraining order to bar Defendants from consummating the transaction with MIP Rail. IRP also filed a Motion to Expedite Proceedings. These pleadings alleged various breaches of the settlement agreement and a breach of the implied covenant of good faith and fair dealing.²

On November 30, 2021, the Court denied IRP's Motion for a Temporary Restraining Order. However, on December 2, 2021, the Court granted IRP's Motion for Expedited Proceedings, finding at least two of its claims in the Complaint were "colorable", and instructed the parties to confer on a schedule for IRP to present a motion for a preliminary injunction. The Court scheduled the preliminary injunction hearing for February 10, 2021. The parties agreed to enter an order preserving the *status quo* ("Order") with respect to the sale of RailUSA until the motion for preliminary injunction had been heard and resolved or until such other time as the Court would allow. A true and accurate copy of the Order is attached hereto as Exhibit A. The Court

² The case is *International Rail Partners, LLC v. American Rail Partners, LLC, et al.*, Case Number 2021-1029-PAF, (Del. Ch.).

issued the Order on December 13. The parties are presently engaged in discovery to prepare for the hearing on February 10.

Accordingly, the fate of the transaction set forth in the Notice remains uncertain and in the hands of the Court. Moreover, IRP feels confident that the transaction set forth in the Notice will be prohibited by the Court, and it will be submitting its own notice of exemption in the near future to acquire control of GRYR and FGA.

II. THE NOTICE SHOULD BE REJECTED BEFORE IT BECOMES EFFECTIVE.

The Notice clearly raises unresolved issues or questions that require considerable scrutiny and must be rejected as it is not appropriate for the class exemption process. Also, the Notice is clearly misleading and must be revoked as it fails to disclose the pending litigation in the Court.³ Lastly, the Notice fails “to certify whether or not a proposed acquisition or operation of a rail line involves a provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means (‘interchange commitment’)” pursuant to 49 C.F.R. § 1180.4(g)(4); therefore, it does not comply with the Board’s rules and is deficient.

A. The Class Exemption Process Is Not Appropriate for This Transaction.

The Board has explained that these streamlined class exemption procedures are reserved for transactions involving routine, uncomplicated, and non-controversial matters. *Burlington N. & Santa Fe Ry.—Acquis. & Operation Exemption—South Dakota*, FD 34645, slip op. at 2-3 (STB served Jan. 14, 2005) (STB stayed exemption notice involving civil litigation between the transaction parties regarding ownership of the subject railroad); *Saratoga & N. Creek Ry.—*

³ While the Notice and the Complaint were both filed on November 24, MIP GP certainly could have supplemented its Notice upon learning of this litigation.

Operation Exemption—Tahawus Line, FD 35559, slip op. at 5 (STB served May 14, 2012). A notice that raises unresolved issues or questions that require considerable scrutiny may be rejected. *Saratoga & N. Creek Ry.*, at 5; *Winamac S. Ry.—Trackage Rights Exemption—A. & R. Line, Inc.*, FD 35208, slip op. at 2 (STB served Jan. 9, 2009) (notice rejected by STB because party to transaction objected to validity of trackage rights agreement); *FPN-USA, Inc.—Operation Exemption—Tijuana-Tecate Shortline*, FD 35155 (STB served Aug. 8, 2008) (STB rejected notice because agency jurisdictional question was at issue); *Pro-Go Corp.—Operation Exemption—In Suffolk County, NY*, FD 35120 (STB served Mar. 13, 2008) (notice rejected by STB that left numerous questions unresolved). Also, the Board’s class exemption procedures are not intended for use in matters that attract substantial controversy and local interest. *Ne. Interchange Ry.—Lease & Operation Exemption—Line in Croton-on-Hudson, N.Y.*, FD 34734, slip op. at 4 (STB served Nov. 18, 2005) (STB rejected notice involving local opposition and litigation and questions about operational changes after transaction); *ABC & D Recycling, Inc.—Lease and Operation Exemption—A Line of Railroad in Ware, Mass.*, FD 35397 (STB served Jan. 20, 2011) (STB rejected notice based on complex questions raised in proceeding).

The transaction at hand involves pending litigation that directly relates to its validity. The Court has already found that IRP’s complaint contains at the very least “colorable” arguments about why this transaction in the Notice should not be allowed to proceed. In similar situations, the Board has rejected notices for this reason. *See Burlington N. & Santa Fe Ry* at 2-3; *Revolution Rail Holding Company, LLC – Acquis. Exemption – Saratoga & N. Creek Ry.*, FD 36535 (STB served Sep. 10, 2021) (notice rejected involving bankruptcy case and adverse abandonment proceeding regarding railroad to be acquired).

As the Board has explained with respect to the class exemption process, “[t]here are some types of situations in which approval would be so routine that we have a “class exemption” allowing parties to obtain Board authorization.” *Riverview Trenton R.R. Company – Acquis. and Operation Exemption – Crown Enterprises, Inc., et al.*, FD 33980, slip op. at 7 (STB served Feb. 15, 2002). The transaction at issue in this case differs substantially from the type of transaction that the Board has viewed as falling within the scope of the class exemption process. Therefore, based on this well-established precedent regarding the class exemption process, it is evident that the Notice filed herein should be rejected.

B. The Notice Is Misleading Because It Fails to Mention This Litigation about the Transaction, Thereby Warranting Its Rejection.

As the Board stated in its notice for this proceeding, “[i]f the verified notice contains false or misleading information, the exemption is void ab initio.” *See* 49 C.F.R. § 1180.4(g)(ii). Failure to disclose material information can render a notice misleading by omission, and therefore void ab initio. *See U S Rail Corp.—Lease & Operation Exemption—Shannon G., a N.J. LLC*, FD 35042, slip op. at 3-4 (STB served Oct. 8, 2008). Here, MIP GP has failed to disclose the litigation in the Court discussed herein which directly relates to the validity of its transaction with ARP and RailUSA. Obviously, this litigation is material to whether it can actually acquire the railroads at issue here.

In similar circumstances involving notices of exemptions where a party failed to provide information that could impact the transaction, the Board has revoked exemptions or rejected notices as “misleading” for this failure to disclose material information. *Eastside Community Rail, LLC—Acquisition and Operation Exemption—GNP Rly Inc.; Ballard Terminal Railroad Company, LLC—Lease Exemption—Eastside Community Rail, LLC*, FD 35730 et al., slip op. at 6 (STB served Dec. 22, 2020) (“First, while the regulations do not specifically require that an applicant disclose disputes relating to the line, see generally § 1150.33, § 1150.43, the regulations

do require applicants to provide a brief summary of the proposed transaction, including the entity transferring the property and a description of the property. As part of that summary, ECR provided information about the ownership of the property and, in doing so, had an obligation to present that ownership information in a way that was not misleading.”); *U S Rail Corp.--Lease & Operation Exemption--Shannon G., LLC*, FD 35042, slip op. at 3-4 (STB served on Oct. 8, 2008) (“We find that U S Rail’s failure to disclose the condemnation action in its notice of exemption renders the notice’s assertions regarding SG’s ownership of the property materially misleading by omission, rendering the notice void ab initio.”); *Jefferson Terminal Railroad Company—Acquisition and Operation Exemption—Crown Enterprises, Inc.*, FD 33950, slip op. at 5 (STB served on Mar. 19, 2001) (“These are substantial factual and legal issues, and under the particular circumstances presented here, we will revoke the exemption, so that any further proceedings (should Jefferson choose to pursue its proposal) would be handled under a more searching process—either through a petition for an individual exemption under 49 CFR 1121, or a full application under 49 CFR 1150—designed to elicit a more complete record. Additionally, we are troubled by Jefferson’s failure to disclose that the property was about to be condemned” in a court action.) Therefore, the exemption notice here should be rejected for failure to disclose this litigation.

C. The Notice Fails to Certify Whether or Not the Proposed Transaction Involves an Interchange Commitment in Accordance with Board Rules, Thereby Making It Deficient.

Pursuant to 49 C.F.R. § 1180.4(g)(4)(i), MIP GP must certify whether or not the proposed transaction would involve a provision or agreement that may limit future interchange with a third-party connecting carrier. MIP GP did not make this certification in its Notice. Moreover, there is such an interchange commitment agreement in place on FGA with CSX Transportation, Inc. *See Florida Gulf & Atlantic Railroad, LLC—Acquisition and Operation Exemption with Interchange Commitment—CSX Transportation, Inc.*, FD-36247. Because it failed to certify whether or not the

proposed transaction involved an interchange commitment, its Notice is deficient and must be rejected. *See Perry County Railroad, LLC – Operation Exemption – Uniontown, Ala.*, FD 36296 (STB served June 7, 2019); *Washington & Idaho Ry, Inc. – Lease and Operation – BNSF Ry Company*, FD 35370 (STB served Apr. 23, 2010).

Based on these three foregoing arguments, this Notice should be rejected before it becomes effective.

III. IN THE ALTERNATIVE, THE BOARD SHOULD STAY THIS PROCEEDING UNTIL THE COURT RULES ON THE VALIDITY OF THE TRANSACTION.

The Board has provided that:

In deciding petitions for stay, the Board follows the traditional stay criteria by requiring a party seeking a stay to establish that (1) there is a strong likelihood that it will prevail on the merits of any challenge to the action sought to be stayed, (2) it will suffer irreparable harm in the absence of a stay, (3) other interested parties will not be substantially harmed; and (4) the public interest supports the granting of the stay. *Hilton v Braunskill*, 481 U.S. 770, 776 (1987); *Washington Metro Area Transit Comm 'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir 1958).

Grand Elk Railroad, LLC - Lease and Operation Exemption-Norfolk Southern Railway Company, FD 35187 (STB served Dec. 22, 2008). Here, IRP will demonstrate that the stay criteria have been met in this situation or at the very least, a stay procedurally makes sense.

A. There Is a Strong Likelihood that IRP Will Prevail on the Merits.

As discussed herein, IRP has provided three extremely strong arguments why the Notice should be rejected.

B. IRP Will Suffer Irreparable Harm in the Absence of a Stay.

Without a stay, the public, shippers, and local governments may believe that MIP Rail is the successful purchaser of GRYR and FGA based on the STB proceeding. If IRP eventually is the successful purchaser, the illusion that MIP Rail is the successful bidder based on the class exemption process will harm IRP's ability to conduct business with these parties, forever

eliminating opportunities that may present themselves in the early days of its control over these railroads. This is even more possible because of the Board's exclusive jurisdiction over railroad acquisitions. Parties may not understand why MIP Rail somehow had obtained authority from the Board, but the Court found IRP to be the proper purchaser. A stay would stop this confusion and allow the proper purchaser to begin its rail business without this cloud of uncertainty.

C. Other Interested Parties Will Not Be Substantially Harmed.

MIP GP, Newco, ARP, and RailUSA will not be harmed by a stay. MIP GP would not be harmed by a stay. It will simply have to await the outcome of the litigation in the Court to determine whether it can proceed with this transaction. Pursuant to the Status Quo Order issued by the Court, MIP GP will have to wait for this determination before it would be allowed to consummate the transaction (if the Defendants are somehow successful). As a result, a corresponding stay in this proceeding would not harm it and would only eliminate confusion about who the proper purchaser should be here.

Newco, ARP, and RailUSA will not be harmed at all. If there is a stay and IRP wins the litigation, they will be paid more money for the railroads. If they are successful in the litigation, MIP GP will then buy the railroads in accordance with the terms of their purchase agreement. Therefore, no one gets hurt because of a stay.

D. The Public Interest Supports the Granting of a Stay.

The public interest clearly supports the granting of a stay. The railroads will continue to operate under present ownership, thereby allowing shippers to maintain adequate rail service. Also, a stay will ensure that the proper party purchases the railroads, thereby avoiding any confusion to the public that would be caused by allowing the exemption to become effective. Shippers and local governments could be unnecessarily confused about who is the owner if this occurs. Granting the

stay would allow the litigation to proceed and eventually permit the rightful party to obtain the proper authority to control these railroads. Finally, the public interest favors fairness, which a stay would provide in this situation involving this dispute over the rightful purchaser.

Therefore, IRP has satisfied the four prongs necessary for a stay which should be granted unless the Board simply rejects the Notice. Moreover, a stay until the Court litigation is final logically makes sense here. The Status Quo Order issued by the Court stops ARP, RailUSA, and MP GIP from consummating the transaction at issue until the preliminary injunction motion is resolved. Therefore, it makes more sense to wait for final resolution of the Court case. This would provide clarity to who is the proper purchaser and the correct party to seek authority to acquire these railroads.

IV. CONCLUSION

Based on the foregoing, the Board should reject the Notice as improper for the class exemption process, misleading, and/or deficient. Alternatively, the Board should grant the stay because IRP has demonstrated it meets all four prongs of the stay criteria and a stay makes sense in light of the pending litigation.

Respectfully submitted,

/s/ Daniel R. Elliott

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EXEMPTION— GRENADA RAILROAD, LLC AND FLORIDA, GULF & ATLANTIC
RAILROAD, LLC**

**VERIFICATION OF J.D. VENTRCEK,
INTERNATIONAL RAIL PARTNERS, LLC PRESIDENT**

VERIFICATION

I, J.D. Ventreck, President of International Rail Partners, LLC, declare under the penalty of perjury under the laws of the United States that the foregoing Verified Petition to Reject Notice of Exemption or, in the Alternative, for Stay of Effectiveness is true and correct. In addition, I hereby verify that I have read the foregoing Verified Petition to Reject Notice of Exemption or, in the Alternative, for Stay of Effectiveness and know the facts asserted therein. Further, I certify that I am qualified and authorized to file this Verification.

Executed on December 16, 2021.

A handwritten signature in black ink, appearing to read "J.D. Ventreck", written over a horizontal line.

J.D. Ventreck

Exhibit A

WHEREAS, a preliminary injunction hearing is scheduled for February 10, 2022;

WHEREAS, the parties have agreed to enter an order preserving the *status quo* (the “Order”) with respect to the sale of RailUSA, LLC (the “Company”) until the motion for preliminary injunction has been heard and resolved or until such other time as set forth below;

IT IS HEREBY ORDERED this _____ day of December, 2021 that:

1. No sale of the Company, Grenada Railroad LLC, Florida Gulf & Atlantic Railroad, LLC, or sale of any shares of these entities, shall close prior to the termination of this Order.

2. This Order shall terminate on the earlier of resolution of the forthcoming motion for preliminary injunction, scheduled to be heard on February 10, 2022; an order by the Court otherwise modifying or vacating this Order; or agreement by the parties to this Action, as approved by the Court.

3. Any of the restrictions imposed by this Order may be waived by written agreement of the parties to this Action. The parties shall promptly notify the Court in writing of any modifications of the terms of this Order. The Court may modify the restrictions of this Order upon the motion of any party, for good cause shown.

4. Nothing in this Order shall be deemed to restrict or prevent any of the Defendants from exercising any other rights or taking any other action that is authorized by applicable law or by the Company's LLC Agreement.

Vice Chancellor Paul A. Fioravanti, Jr.

This document constitutes a ruling of the court and should be treated as such.

Court: DE Court of Chancery Civil Action

Judge: Paul A Fioravanti Jr

File & Serve

Transaction ID: 67160459

Current Date: Dec 13, 2021

Case Number: 2021-1029-PAF

Case Name: CONF ORD International Rail Partners, LLC v. American Rail Partners, LLC, RailUSA, LLC and Newco SBS Holdings, LLC

Court Authorizer: Paul A Fioravanti Jr

/s/ Judge Paul A Fioravanti Jr

Certificate of Service

I certify that I have, this 17th day of December 2021, served by email copies of the foregoing document on all parties of record in this proceeding, including:

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/s/ Daniel R Elliott
Daniel R. Elliott
Attorney for International Rail Partners, LLC