

**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**

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

Macquarie Infrastructure Partners V GP, LLC (“MIP GP”), for the benefit of Macquarie Infrastructure Partners V fund vehicle (“MIP V”) and MIP V Rail, LLC (“MIP Rail”), submits this Reply to the Verified Petition of International Rail Partners, LLC to Reject Notice of Exemption Or, In The Alternative, For Stay Of Effectiveness (the “Petition”) filed in the above-captioned proceeding on December 17, 2021.

On November 24, 2021, MIP GP filed a Notice of Exemption pursuant to 49 C.F.R. §1180.2(d)(2) to acquire control of RailUSA, LLC (“RailUSA”) and its two common carrier freight railroads: Grenada Railroad, LLC (“GRYR”) and Florida, Gulf & Atlantic Railroad, LLC (“FGA”). Now, at the eleventh hour, a disgruntled losing bidder is attempting to hijack a straightforward class exemption proceeding to litigate before this agency a contract claim currently pending before the Delaware Chancery Court. As MIP GP demonstrates below, the Petition fails to articulate any legitimate basis to reject or stay the effectiveness of MIP GP’s Notice of Exemption. Consistent with its longstanding practice, the Board should decline to embroil itself in that contract dispute, and should deny the Petition.

I. BACKGROUND

GRYR and FGA are wholly owned subsidiaries of RailUSA, which in turn is wholly owned by American Rail Partners LLC (“ARP”). On November 23, 2021, MIP Rail, ARP and RailUSA entered into a Purchase Agreement pursuant to which MIP Rail (a wholly owned indirect affiliate of MIP GP) agreed to acquire 100% of the equity interests of RailUSA. As a consequence of that transaction, MIP Rail will control GRYR and FGA. On November 24, 2021, MIP GP filed the required Notice of Exemption pursuant to 49 C.F.R. § 1180.2(d)(2) in connection with that control transaction. As explained in the Notice of Exemption (at 1-2), (i) neither MIP Rail, MIP V, MIP GP nor any of their affiliates currently owns or controls any United States rail carrier, (ii) 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, and (iii) no Class I carrier is involved in the transaction. Accordingly, the transaction is exempt pursuant to Section 1180.2(d)(2) of the Board’s regulations.¹ As stated in the Board’s *Federal Register* notice, the exemption will be effective on December 24, 2021.²

Petitioner IRP holds a minority equity stake in RailUSA. According to Petitioner,

“MIP Rail was selected by ARP, which wholly owns RailUSA, from a number of interested purchasers [including IRP] in a competitive bidding process despite not being the highest bidder ... Despite this high bid, ARP decided to choose MIP Rail in

¹ 49 C.F.R. § 1180.2(d)(2).

² Macquarie Infrastructure Partners V GP, LLC-Acquisition of Control Exemption-Grenada R.R., LLC, and Fla., Gulf & Atl. R.R., LLC, 86 Fed. Reg. 70,567 (2021).

breach of its settlement agreement with IRP arising from the earlier litigation.”³

Petitioner filed a Verified Complaint against ARP, RailUSA and NEWCO SBS, LLC for breach of contract, alleging that the settlement agreement required ARP to sell RailUSA to IRP.⁴ Petitioner’s claims are currently pending before the Delaware Chancery Court.⁵ Neither MIP GP, MIP V nor MIP Rail are parties to that litigation. On November 30, 2021, the Delaware court denied IRP’s motion for a Temporary Restraining Order. However, the parties to the litigation agreed to a Proposed Status Quo Order, which was entered by the court on December 2, 2021. Pursuant to that order, no sale of RailUSA or its carrier subsidiaries will close until the Status Quo Order is terminated.⁶

II. THE PETITION TO REJECT THE NOTICE OF EXEMPTION SHOULD BE DENIED.

“A party seeking revocation or rejection of a notice of exemption has the burden of demonstrating that the notice contains false or misleading information, or that regulation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101.”⁷ IRP’s Petition does not even mention the Rail Transportation Policy (“RTP”) – much less demonstrate any reason why formal regulation of the transaction that is the subject of the Notice of Exemption is necessary to carry out any element of the RTP.

³ See Petition at 4.

⁴ NEWCO SBS, LLC holds a majority of the equity interest in ARP.

⁵ *Int’l Rail Partners, LLC v. American Rail Partners, LLC*, C.A. No. 2021-1029-PAF (Del. Ch.).

⁶ See Petition, Ex. A.

⁷ *Gen. Railway Corp.—Exemption for Acquis. of R.R. Line—in Osceola & Dickinson Ctys., Iowa*, STB Finance Docket No. 34867 (STB served June 15, 2007) (“*General Railway Exemption*”) at 4.

The Notice of Exemption complies in all respects with the Board’s regulations, and the underlying transaction – the acquisition of control of two small non-connecting carriers – is wholly consistent with the numerous transactions that the Board has allowed to proceed under the Section 1180.2(d)(2) class exemption in the past. Contrary to Petitioner’s assertions, the Notice of Exemption does not raise any unusual or complex public interest question that renders the transaction inappropriate for authorization pursuant to the class exemption, nor is it in any manner inaccurate or misleading. Accordingly, the Board should deny Petitioner’s request to reject the Notice of Exemption.

A. The Class Exemption Process Is Appropriate Here.

Petitioner asserts that the Notice of Exemption should be rejected because it “clearly raises unresolved issues or questions that require considerable scrutiny. . . .”⁸ This assertion flies in the face of longstanding Board precedent holding that contract disputes like the one between ARP and IRP are not matters for adjudication before this agency and do not provide a basis for rejection of a Notice of Exemption.

“[T]he Board does not typically reject or revoke a notice of exemption based solely on a contract or property dispute.”⁹ For example, the Board denied a petition to reject or revoke a class exemption to acquire a rail line where a party challenged the validity of the underlying purchase agreement. The Board determined that:

⁸ See Petition at 6.

⁹ *Oakland Glob. Rail Enters., LLC—Acquisition Exemption—Rail Line in Alameda County, Cal.*, STB Finance Docket No. 36301, at 5 (STB served Oct. 28, 2019).

[a]ny dispute regarding the validity of this agreement, or ownership of the Line, involves questions of state contract and property law. The Board is not the proper forum to resolve such disputes. Rather, these matters are best left for state courts to decide. Allowing the notice of exemption in this proceeding to become effective will not affect the contract interpretation issues that involve state law.”¹⁰

Likewise, in *City of Alameda—Acquisition Exemption—Alameda Beltline R.R.*,¹¹ the Board held that “[t]he fact that [the parties] are litigating the validity of the repurchase option in state court, however, does not make the City’s notice complicated or controversial insofar as use of the exemption is concerned.”¹²

In this case, the seller is party to a contract dispute with a disgruntled party whose bid to acquire the subject railroads was not selected. Consistent with the cases discussed above, this contract dispute is best left to the Delaware Chancery Court, and provides no grounds for rejecting the Notice of Exemption.

The cases cited by Petitioner in support of its rejection request are inapposite and provide no support for rejecting the Notice of Exemption regarding a straightforward corporate change of control at issue here. For example, *FPN-USA, Inc.-Operation Exemption-Tijuana-Tecate Shortline* involved the fundamental question whether the Board had jurisdiction at all over a Mexican carrier.¹³ In *Saratoga & N. Creek Ry.—Operation Exemption—Tahawus Line*,¹⁴ the

¹⁰ *General Railway Exemption* at 4.

¹¹ STB Finance Docket No. 34798, at 3 (STB served April 3, 2006).

¹² *Id.* See also *Lehigh Ry., LLC—Lease Exemption Containing Interchange Commitment—Norfolk S. Ry. Co.*, STB Finance Docket No. 36062, at 2 (STB served Oct. 14, 2016) (a dispute regarding whether a lease renewal was permitted by contract was not a sufficient basis for the Board to reject an exemption).

¹³ STB Finance Docket No. 35155 (STB served Aug. 8, 2008).

¹⁴ STB Finance Docket No. 35559 (STB served May 14, 2012).

Board affirmed an earlier decision by the Director of Proceedings rejecting an exemption where the Director determined that “the exemption sought is for purposes other than for providing common carrier rail service.”¹⁵ Likewise, in *ABC & D Recycling, Inc.—Lease and Operation Exemption—A Line of Railroad in Ware, Mass.*,¹⁶ the issue was whether the party “had the ability and intent to act as a common carrier.” Here, the Notice of Exemption raises no jurisdictional issue, nor does Petitioner proffer any basis for finding that GRYR and FGA will not continue to provide common carrier service.¹⁷

Allowing the Notice of Exemption to go into effect will not adversely affect Petitioner’s ability to litigate its contract claim against ARP:

“The Board’s authority to exempt acquisitions is merely permissive ... [p]ermitting the exemption to become effective will not alter any rights to the line that the parties currently have. Rather, *it merely allows parties to exercise rights under the governing federal statute to acquire and operate trackage if they are otherwise lawfully able to acquire them.*”¹⁸

¹⁵ See *Saratoga & N. Creek Ry.—Operation Exemption—Tahawus Line*, STB Finance Docket No. 35559, at 2 (STB served Nov. 23, 2011).

¹⁶ STB Finance Docket No. 35397, at 3 (STB served Jan. 20, 2011).

¹⁷ The other cases cited by Petitioner are similarly distinguishable from the facts here and, therefore, unavailing as useful precedents. See *N. Interchange Ry. LLC—Lease & Operation Exemption—Line in Croton-on-Hudson, NY*, STB Finance Docket No. 34734 (STB served Nov. 18, 2005) (local opposition to significant change in local railroad operations); *Pro-Go Corp.—Operation Exemption-In Suffolk County, NY*, STB Finance Docket No. 35120 (STB served Mar. 13, 2008) (Exemption notification was missing information required by the rules); *Winamac S. Ry.—Trackage Rights Exemption—A. & R. Line, Inc.*, STB Finance Docket No. 35208, (STB served Jan. 9, 2009) (exemption filing was for an after the fact approval of trackage rights the counterparty told the Board were no longer in effect); *Burlington N. & Santa Fe Ry. Co.—Acquisition & Operation Exemption—S.D.*, STB Finance Docket No. 34645, (STB served Jan. 14, 2005) (complex case involving the transfer of certain lines not owned by BNSF from modified certificate status to Section 10901 railroad line status).

¹⁸ *Keokuk Junction Ry. Co. – Acquisition and Operation Exemption – West End of Toledo, Peoria & W. Ry. Corp.*, STB Finance Docket No. 34085, at 2 (STB served Aug. 23, 2001) (emphasis added). See also *Ohio River Partners LLC—Acquisition and Operation Exemption—Hannibal*

Petitioner has not demonstrated any legitimate basis for the Board to depart from its well-established practice here.

B. The Notice of Exemption Is Not False, Misleading or Deficient.

Petitioner's contention that the Notice of Exemption is misleading is meritless.

Petitioner claims that MIP GP's failure to disclose the litigation between IRP and ARP in the Notice of Exemption renders that Notice misleading.¹⁹ As an initial matter, MIP GP filed its Notice of Exemption on November 24, 2021, *before* the state court litigation was commenced, and therefore could not have mentioned it in the Notice.²⁰ In any event, the Board has rejected the notion that the failure to disclose a contract dispute relating to the right to acquire or operate a line that is the subject of a Notice of Exemption renders the Notice false or misleading.²¹

In *Ohio River Partners LLC—Acquisition and Operation Exemption—Hannibal Dev., LLC*,²² the Board denied a motion to reject a Notice of Exemption that did not mention an ongoing dispute involving the scope of the parties' respective rights to operate on the subject rail

Dev., LLC, STB Finance Docket No. 35984, at 3 (STB served April 1, 2016) ([T]he Board's grant of authority to operate under a notice of exemption is permissive only, and in order to exercise that authority and commence operations, the carrier must still obtain the necessary rights under state property and/or contract law.").

¹⁹ See Petition at 8-9.

²⁰ Petitioner appears to acknowledge that reality, but argues that "MIP GP certainly could have supplemented its Notice upon learning of this litigation." Petition at 6, n.3.

²¹ Petitioners' assertion (Petition at 4-5) that the ARP-IRP settlement agreement "guaranteed [IRP's] ability to be the purchaser of the railroads if it wished to do so" is itself false and misleading. In denying IRP's motion for a Temporary Restraining Order, the Delaware court determined that "*The settlement agreement did not guarantee that ARP would ultimately select IRP's bid if it was the highest bid submitted. Because IRP has failed to show that the settlement agreement obligated ARP to select the highest bid submitted during the sale process, the claim is not colorable.*" See Exhibit 1, Court's Ruling on Plaintiff's Motion to Expedite at 14 (emphasis added).

²² STB Finance Docket No. 35984 (STB served April 1, 2016).

line. The Board observed that “its regulations at 49 C.F.R. §§ 1150.31-36 do not require the disclosure of such third-party contractual disputes,” and held that “the existence of such a dispute is not grounds for rejecting an exemption.”²³ None of the cases cited by Petitioner stand for the proposition that a notice of exemption is invalid simply because the rail line at issue is the subject of litigation or that the proponent of a notice of exemption is required to supplement its notice if it learns of such litigation after the notice is filed.²⁴

Petitioner next claims that the Notice of Exemption is deficient because MIP GP did not comply with the Board’s regulation at 49 C.F.R. §1180.4(g)(4)(i), which requires the proponent of a Notice of Exemption to provide certain information regarding interchange commitments (commonly referred to as “paper barriers”) entered into in connection with a proposed transaction. The obvious purpose of this regulation is to require parties to report to the Board any such “paper barriers” that are created in connection with an exempt transaction.

However, Section 1180.4(g)(4)(i) is not applicable to the MIP GP Notice of Exemption. On its face, the regulation applies only if “*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. . . .” 49 C.F.R. §1180.4(g)(4)(i) (emphasis added). The transaction that is the subject of

²³ *Id.* at 3.

²⁴ The cases cited by Petitioner (at 8-9) to support its claim that the Notice of Exemption here was misleading are inapposite. In *U S Rail Corp.—Lease & Operation Exemption—Shannon G., a N.J. LLC*, STB Finance Docket No. 35042 (STB served October 8, 2008) the Board found that the prospective lessee knowingly misled the Board regarding the ownership status of the property at issue, and was attempting to misuse the Board’s processes for the purpose of defeating a state condemnation proceeding. *Jefferson Terminal R.R. Co.—Acquisition and Operation Exemption—Crown Enterps., Inc.*, STB Finance Docket No. 33950 (STB served on Mar. 19, 2001) involved a similar scheme to defeat a state condemnation proceeding. *Eastside Cmty. Rail, LLC—Acquisition and Operation Exemption—GNP Rly Inc* and the related *Ballard Terminal R.R. Co., LLC—Lease Exemption—Eastside Community Rail, LLC*, STB Finance Docket No. 35730 (STB served Dec. 22, 2020) involved false statements regarding the ownership status of an easement.

the Notice of Exemption here is not “a proposed acquisition or operation of a rail line.” Rather, it involves the acquisition of control of two non-connecting carriers under 49 C.F.R. §1180.2(d)(2), pursuant to an agreement to acquire the equity interests of the parent of those carriers (RailUSA).²⁵ Consistent with the language of the regulation itself, the Board has interpreted the requirements at Section 1180.4(g) as not applying to control transactions under Section 1180.2(d)(2).²⁶ Although some parties have in the past opted to provide an interchange certification in their verified notices seeking control exemptions, it is plainly not required by the regulation.²⁷

Petitioner correctly observes that there exists an interchange agreement between FGA and CSXT relating to FGA’s rail line. But that interchange commitment was not agreed to or otherwise created by the control transaction at issue in this proceeding. Rather, it was entered into by FGA, and *reported to the Board three years ago*, in the Verified Notice of Exemption filed in *Florida Gulf & Atlantic Railroad, LLC— Acquisition and Operation Exemption with*

²⁵ The Board has allowed numerous Notices of Exemption under Section 1180.2(d)(2) go into effect that do not reference Section 1180.4(g)(4)(i), because it is not applicable. *See, e.g., Finger Lakes Ry. Corp.—Continuance in Control Exemption—Midcoast Railservice, Inc.*, STB Finance Docket No. 36532 (STB served Aug. 25, 2021); *Fortress Investment Grp., LLC—Acquisition and Continuance in Control Exemption—Ohio River Partners S’holder LLC et al*, STB Finance Docket No. 36521 (STB served June 30, 2021).

²⁶ *See, e.g., Finger Lakes Ry.—Continuance in Control Exemption—Midcoast Railservice, Inc.*, STB Finance Docket No. 36532 (STB served Aug. 25, 2021); *Fortress Investment Group LLC—Acquis. & Continuance in Control Exemption—Ohio River Partners Shareholder LLC, et al.*, STB Finance Docket No. 36521 (STB served June 30, 2021); *Watco Holdings, Inc.—Continuance in Control Exemption—Ringneck & W. R.R.*, STB Finance Docket No. 36512 (STB served Apr. 30, 2021).

²⁷ The Board itself stated recently that the interchange commitment provisions of Section 1180.4(g) were intended to apply to purchases and leases of rail lines. It then clarified that its provisions do not apply to trackage rights agreements. *See Pet. For Rulemaking—R. R. Consol. Procedures—Exemption for Emergency Temporary Trackage Rights*, STB Ex Parte No. 282 (Sub-No. 21), at 7-8 (STB served May 28, 2021).

Interchange Commitment—CSX Transportation, Inc., STB Finance Docket No. 36247 (STB served December 7, 2018). FGA provided all of the information required by Section 1180.4(g)(4)(i) to the Board in that proceeding.²⁸ Petitioner’s suggestion that Section 1180.4(g)(4)(i) requires the proponent of a subsequent corporate control transaction to repeat in its Notice of Exemption information regarding pre-existing interchange commitments previously reported in connection with the acquisition of rail lines in a prior proceeding is both unsupported by the language of the regulation and unprecedented. Petitioner cites no case in which such a requirement was imposed by the Board, or where the proponent of an exempt control transaction included such information regarding pre-existing interchange commitments in its notice of exemption.

Because Section 1180.4(g)(4)(i) is plainly inapplicable here, it cannot provide any grounds for rejecting MIP GP’s Notice of Exemption.

In summary, Petitioner has utterly failed to carry its burden of proving that formal regulation of the exempt control transaction that is the subject of MIP GP’s Notice of Exemption is necessary to carry out the Rail Transportation Policy, or that the Notice of Exemption is false or misleading. Therefore, Petitioner’s request that the Notice of Exemption rejected must be denied.

III. PETITIONER HAS FAILED TO SATISFY THE CRITERIA FOR A STAY.

Petitioner has failed to satisfy the Board’s well-established criteria for a stay: (1) that there is a strong likelihood that Petitioner will prevail on the merits of its challenge to the Notice of Exemption; (2) that Petitioner will suffer irreparable harm in the absence of a stay; (3) that

²⁸ See *Florida Gulf & Atlantic R.R., LLC—Acquisition and Operation Exemption with Interchange Commitment—CSX Transp., Inc.*, STB Finance Docket No. 36247, *Verified Notice of Exemption*, at 5-6 (filed Dec. 7, 2018).

other interested parties will not be substantially harmed by a stay; and (4) that the public interest supports granting the requested stay.²⁹

Merits. Petitioner’s argument for its likelihood of prevailing on the merits rests entirely on its claims (i) that the proposed control transaction is too complicated or controversial to proceed under the class exemption because litigation relating to the subject carriers is pending in a court, (ii) that the Notice of Exemption was misleading because it did not disclose the litigation between IRP and ARP and (iii) that MIP GP failed to comply with the (inapplicable) requirement of Section 1180.4(g)(4)(i). As MIP GP demonstrates in Part II above, Petitioner has failed to demonstrate that any of those claims has any merit whatsoever (much less that Petitioner is likely to prevail on any of those claims).

Irreparable Harm. Petitioner will not suffer irreparable harm if the Notice of Exemption becomes effective. As Petitioner itself advised the Board, the parties to the pending litigation in the Delaware Chancery Court (IRP and ARP) jointly requested that the court enter a Status Quo Order, and the court approved that order on December 2, 2021.³⁰ The terms of the Status Quo Order ensure that MIP GP’s proposed acquisition of RailUSA will not close until after a hearing on IRP’s motion for Preliminary Injunction (or other order of the court terminating the Status Quo Order). As the Board has frequently observed, STB regulatory authority (or exemption) is “permissive” only – MIP GP will be able to consummate the transaction only when the court issues an order terminating the current Status Quo Order.

²⁹ See, e.g., *Gen. Ry. Corp.—Exemption for Acquisition of R.R. Line—In Osceola & Dickinson Counties, IA*, STB Finance Docket No. 34867, at 1 (STB served July 13, 2007); *Watco Cos., Inc. & Watco Transp. Servs., Inc.—Continuance in Control Exemption—Michigan Central Ry., LLC*, STB Finance Docket No. 35064, at 2 (STB served Aug. 8, 2007).

³⁰ See Petition, Ex. A.

Petitioner offers a fanciful additional argument in support of its claim of irreparable harm. Petitioner asserts that, “[w]ithout 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.”³¹ According to Petitioner, such an “illusion” that MIP Rail was the successful buyer “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.”³²

Petitioner’s attempt to portray MIP GP’s Notice of Exemption as a “scarlet letter” that would irreparably damage IRP’s business prospects *even if MIP GP never acquires RailUSA* is nonsensical. Regardless of which party ultimately acquires RailUSA, the day-to-day operations and business of GRYR and FGA will be conducted (as they are today) by the railroads, not by the *shareholders* of their parent entity. Petitioner gives too little credit to shippers and other stakeholders, who are more than capable of understanding the difference between a regulatory approval and the actual closing of a transaction. Moreover, lost business opportunities with customers are a form of monetary harm that do not support a claim of irreparable harm.³³

In any event, MIP GP’s Notice of Exemption and the Purchase Agreement among MIP Rail, RailUSA and ARP are public records both at the STB and in the Delaware Chancery Court. Indeed, *IRP’s own filings in both forums disclosed that MIP Rail was the successful bidder*

³¹ See Petition at 10.

³² *Id.* at 10-11.

³³ The Board “has consistently held in the past, ‘monetary’ or ‘economic loss by itself does not constitute irreparable harm.’” *Edwin Kessler—Petition for Injunctive Relief*, STB Finance Docket No. 35206, at 5 (STB served June 12, 2009) *quoting and citing* *Seminole Elec. Coop., Inc. v. CSX Transp., Inc.*, STB Docket No. 42110, at 4 (STB served Dec. 22, 2008); *Consol. Rail Corp.—Abandonment—Between Corry and Meadville*, Docket No. AB-167 (Sub-No. 1129) (ICC served Oct. 5, 1995).

selected by ARP in the sale process for the railroads. A stay would not expunge those public documents, and any “confusion” that might occur (based on Petitioner’s bizarre theory) would occur anyway.

Other Interested Parties. Petitioner’s claim that other interested parties (including MIP GP) would not be harmed by a stay is incorrect.³⁴ As discussed above, the Status Quo Order prevents a closing prior to resolution of IRP’s motion for preliminary injunction, unless the court orders otherwise. Under the circumstances, an additional STB stay is simply unnecessary. If the court rejects IRP’s claims, denies the injunction, and finds that the transaction may go forward as a matter of contract law, there is no reason why MIP Rail and ARP should not be able to proceed in accordance with that determination. However, an STB stay will impose needless delay and expense on MIP GP, as further proceedings before the Board would be required to vacate the STB stay.³⁵ This would, in turn, needlessly delay MIP GP’s ability to deliver the benefits of the transaction for the railroads and their customers.

Public Interest. Petitioner contends that the public interest supports granting a stay because “[t]he railroads will continue to operate under present ownership, thereby allowing shippers to maintain adequate rail service.”³⁶ As an initial matter, the court’s Status Quo Order ensures that the railroads can continue to operate in the normal course while IRP’s motion for preliminary injunction is pending. Moreover, there is no reason to believe that GRYR and FGA

³⁴ See Petition at 11.

³⁵ See, e.g., *Middletown & New Jersey R.R., LLC—Lease and Operation Exemption—Norfolk Southern Ry. Co.*, STB Finance Docket No. 35412 (STB served Oct. 6, 2010) (rejecting stay where the petitioner failed to make a showing regarding other interest parties and buyer demonstrated that benefits of the transaction would be delayed by a stay).

³⁶ See Petition at 11.

will not continue to provide adequate rail service regardless of any change in the shareholder of their parent entity. Indeed, as Petitioner acknowledges (Petition at 3), MIP Rail is owned by MIP V, an Americas-focused \$6.9 billion infrastructure fund. Petitioner has not taken issue with MIP GP's statement that the transaction "will enhance RailUSA's access to capital and enable continued investment in GRYR and FGA."³⁷ MIP GP's acquisition of GRYR and FGA will not result in any degradation of service, nor will GRYR or FGA employees be adversely affected by the transaction.³⁸

Finally, Petitioner asserts that a stay would "permit the rightful party to obtain the proper authority to control these railroads."³⁹ Petitioner's claim that it – and not MIP Rail – is that "rightful party" is based on its unproven and self-serving interpretation of the settlement agreement between IRP and ARP. Petitioner's claim raises an issue of contract law that is the province of the Delaware Chancery Court, not the Board. The court has already entered an order that maintains the status quo pending its ruling on IRP's motion for preliminary injunction, so an additional stay order from the STB would be redundant. The public interest will be best served by leaving each of the court and the STB to resolve the issues that are properly before it without unnecessary interference from the other.⁴⁰

³⁷ See Notice of Exemption at 5. See, e.g., *City of Alameda—Acquisition Exemption—Alameda Beltline R.R.*, STB Finance Docket No. 34798, at 6 (STB served April 3, 2006) (Acquisition would "result in no detrimental change to the level of service" and petitioner has "failed to demonstrate that a stay would further the public interest.").

³⁸ *Illinois Railnet, Inc.—Acquisition and Operation Exemption—The Burlington Northern and Santa Fe Ry. Co.*, STB Finance Docket No. 33516 (STB served Dec. 16, 1997) (stay denied where, *inter alia*, there are no adversely affected employees from a transaction).

³⁹ See Petition at 12.

⁴⁰ See, e.g., *Iowa, Chicago & Eastern R.R. Corp.—Acquisition and Operation Exemption—Lines of I&M Rail Link, LLC*, STB Finance Docket No. 34177, at 18 (STB served July 22, 2002) ("We

IV. Conclusion.

For the foregoing reasons, MIP GP respectfully urges the Board to deny Petitioner's request for rejection or stay of the Notice of Exemption in its entirety.

Respectfully submitted,

/s/ Terence M. Hynes
Terence M. Hynes
Marc A. Korman
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Attorneys for Macquarie Infrastructure Partners V GP, LLC, Macquarie Infrastructure Partners V and MIP V Rail, LLC

Dated: December 20, 2021

simply find that it is in the public interest to allow this transaction to take place and thereby ensure uninterrupted service to IMRL's shippers, and with it jobs for IMRL's employees").

CERTIFICATE OF SERVICE

I certify that on this 20th day of December, 2021, I have served by email a copy of the foregoing document on:

Daniel R. Elliott
GKG Law, P.C.
1055 Thomas Jefferson St., NW
Suite 500
Washington, DC 20007
(202) 342-5248
delliott@gkglaw.com
*Attorney for International
Rail Partners, LLC*

/s/Marc Korman
Marc Korman

EXHIBIT 1

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

INTERNATIONAL RAIL PARTNERS, LLC, :

Plaintiff, :

v. : C.A. No.

: 2021-1029-PAF

AMERICAN RAIL PARTNERS, LLC, RAILUSA, :

LLC and NEWCO SBS HOLDINGS, LLC, :

Defendants. :

- - -

Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Thursday, December 2, 2021
1:30 p.m.

- - -

BEFORE: HON. PAUL A. FIORAVANTI, JR., Vice Chancellor

- - -

THE COURT'S RULING ON PLAINTIFF'S MOTION TO EXPEDITE

CHANCERY COURT REPORTERS
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware 19801
(302) 255-0521

1 topping bid should have been the last bid in the sale
2 process. Defendants, though, provide some strong
3 counterarguments as well. Defendants assert that the
4 process letter reserved the right to modify the sale
5 process at any time. Furthermore, defendants ensured
6 that IRP and IIF had the opportunity to submit a final
7 bid, as they were required to do by the side letter.

8 Similar to my considerations regarding
9 the LTIP payments, this is not an issue that I have to
10 resolve today. IRP has presented a litigable and
11 colorable claim for purposes of this motion. As I
12 said earlier, colorability is a very low standard. We
13 are at a very preliminary stage. Based on the
14 complaint and the exhibits thereto, I am persuaded
15 that these two claims are colorable. The remainder of
16 IRP's claims, in my view, are not colorable.

17 It is hard to understand the nature of
18 IRP's claim regarding defendants' alleged disclosure
19 of IRP's November 12 topping bid. In its opening
20 brief, IRP argues that "ARP did not hold a contract
21 right to disclose the November 12 topping bid to other
22 bidders." Plaintiff's opening brief, paragraph 20.
23 Then, in its reply brief, IRP contends that it has a
24 right to enforce the NDA, which it argues was

1 breached. Reply brief, paragraphs 15 to 18.

2 Nevertheless, I am not persuaded by either theory.

3 IRP cites no authority for the
4 proposition that ARP needed a contractual right to
5 disclose the November 12 topping bid. The NDA, which
6 explicitly reserves the right of IIF to keep
7 information confidential, is also a convincing
8 counterexample.

9 Additionally, IRP was not a party to
10 the NDA. IIF is the party to the NDA, and it is not a
11 plaintiff here. IRP fails to provide a sufficient
12 legal basis to persuade me that it has the authority
13 to enforce the NDA if defendants, in fact, violated
14 it. Therefore, I do not find this claim colorable.

15 IRP also alleges that defendants
16 breached the settlement agreement by not accepting
17 IRP's topping bid, even though it was the highest bid.
18 IRP neglects to explain how this breached the
19 settlement agreement. The settlement agreement did
20 not guarantee that ARP would ultimately select IRP's
21 bid if it was the highest bid submitted. Because IRP
22 has failed to show that the settlement agreement
23 obligated ARP to select the highest bid submitted
24 during the sale process, the claim is not colorable.

1 Nor is that a breach of the letter agreement.

2 I am also unconvinced that defendants'
3 request that IRP waive any breaches of the settlement
4 agreement was a breach of that agreement. IRP has
5 failed to explain how this request constituted a
6 breach, devoting only one sentence in its opening
7 brief to this claim.

8 IRP quotes a portion of *Citisteel USA,*
9 *Inc. versus Connell Limited Partnership*, 758 A.2d 928
10 from the Supreme Court in 2000, for the proposition
11 that "[u]nder Delaware law, a party breaches by
12 insisting upon a waiver of its own prior breaches of
13 contract, as a condition of performing the contract."
14 In *Citisteel*, the Delaware Supreme Court held that a
15 party's statement that it will not perform under a
16 contract "unless terms different from the original
17 contract are met also constitutes a repudiation."

18 Plaintiff has not persuaded me that
19 the law of contract repudiation is analogous to the
20 negotiation of a waiver in these circumstances.
21 Therefore, this claim is also not colorable.

22 As a backstop, IRP asserts that to the
23 extent defendants' actions do not constitute a breach
24 of contract, they nevertheless establish a claim for a